SUPREME COURT, U. S.

Supreme Court, U.S.
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NO. ~~18081~~ 70-263

UNITED STATES SUPREME COURT

JOYCE LEE, and JOYCE EVE
LEE COSMETICS, INC.

Petitioners,

vs.

SENTA MARIA RUNGE,

Respondent.

PETITION FOR CERTIORARI

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A. Reference To The Official and Unofficial Reports of The Opinions Of The Courts Below

The report of the opinion of the District Court is contained in 161 USPQ 770. The opinion of the Court of Appeals is not reported. Copies of the opinion of the District Court and Court of Appeals are attached as Appendices A and B, respectively.

B. Concise Statement Of The Grounds on Which The Jurisdiction of The Court Is Invoked

On March 26, 1971 the Court of Appeals entered a judgment pursuant to Rule 36 of the Federal Rules of Appellate Procedure affirming the judgment of the Court below:

Appellant did not petition for a rehearing. On May 13, 1971 the Court of Appeals filed an order under Rule 41(a) of the Federal Rules of Appellate Procedure staying issuance of the certified copy of the judgment pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by appellants, provided such petition were filed in the Clerk's Office of the Supreme Court of the United States on or before June 12, 1971.

Jurisdiction of this Court to review the judgment in question by writ of

certiorari is conferred by Section 1254(1) of Title 28, United States Code.

C. Questions Presented For Review

1. Is the constitutional standard in Article I, Section 8, Clause 8, of the United States Constitution, "to promote the progress of science and useful arts," applicable to copyrights?

2. If so, does the copyrighted work of Santa Maria Runge, meet the constitutional standard if construed to cover the Joyce Lee book?

3. If an author sells material to a magazine publisher and after publication of the material in the magazine without a copyright notice in the name of the author and without an assignment to the author of the publisher's copyright in the magazine, can the author incorporate and publish the material in a book copyrighted by the author and bring an action on the author's copyright in the book for infringement of the material first published in the magazine without the consent of

and without joining the publisher?

4. Does an author dedicate material to the public if he sells the material to a magazine publisher and, after publication of the material in the magazine which is copyrighted only in the name of the publisher, he incorporates and publishes the material in a book copyrighted in the name of the author without first recording an assignment to him of the publisher's copyright in the magazine?

5. Does it constitute unclean hands for the author to fail to specify in a certificate of copyright the new matter in the copyrighted work?

6. Does a copyright in a non-dramatic work, which describes unpatented processes covering a system ofexercises, cover a work containing a non-literal description of said processes or system, or, in other words, does such a copyright cover all writings describing the pro-

cesses or system?

7. Is the admission in a jury case of hearsay evidence over objection to prove damages for copyright infringement inconsistent with substantial justice under Rule 61 of the Federal Rules of Civil Procedure, if the hearsay is the only evidence of damages, or even if it is not?

8. Does a copyright cover an idea itself?

D. Constitutional Provisions, Treaties, Statutes, Ordinances or Regulations Which the Case Involved

Article I, Section 8, Clause 8, of the United States Constitution provides that:

"The Congress shall have the power ...

* * *

"(8) To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;"

Section 32 of Title 17, United States Code, provides that:

"When an assignment of the copyright in a specified book or other work has been recorded the assignee may substitute his

name for that of the assignor in the statutory notice of copyright prescribed by this title."

Rule 61 of the Federal Rules of Civil Procedure provides that:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the

substantial rights of the parties."

E. Concise Statement of the Case

On May 16, 1966, plaintiff-Appellee Senta Marie Runge, hereafter called Miss Runge, sued defendants-Appellants Joyce Lee, hereafter called Miss Lee, and Joyce Eve Lee Cosmetics, Inc., hereafter called Lee Inc., for copyright infringement and unfair competition and requested a jury trial. C.Tr.2.* On May 2, 1967, Miss Runge filed an amended complaint for copyright infringement and unfair competition and again requested a jury trial. C. Tr. 90. On May 23, 1967, Miss Lee and Lee Inc. filed an answer and counterclaim to the amended complaint. C. Tr. 99. The counterclaim was withdrawn during trial.

On February 17, 1969, the jury returned a verdict against Miss Lee and Lee Inc. for damages for copyright infringement in the amount of $80,000 and for damages for unfair competition in the amount of $40,000. The jury also

returned a verdict for punitive damages for unfair competition against Miss Lee in the amount of $25,000 and against Lee Inc. in the amount of $20,000. C. Tr. 557. Thereafter, the Court held a trial in equity on the issue of an accounting for profits and an injunction. R. Tr., Vol. 2, 3/24/69, pp. 589-699**; R. Tr., Vol. 3, 3/25-26/69, pp. 700-888. The Court found the net infringing profits to be $64,253, granting an injunction, awarded attorney's fees in the amount of $12,000 and ordered the destruction of 11,158 copies of Miss Lee's book valued at over $250,000.00. On April 21, 1969, the Court filed its Findings of Fact and Conclusions of Law, Cl. Tr. 600, and a Judgment, Cl. Tr. 606, in accordance

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* Clerk's Transcript, page 2

** Reporter's Transcript, Vol. 2, March 24, 1969, pages 589-699.

with its findings and the jury verdict.

Defendants filed a Motion for a New Trial, C. Tr. 612, a Motion for Judgment Notwithstanding the Verdict, C. Tr. 627, and a Motion for Stay of Judgment and To Fix Supersedeas Bond, C. Tr., 678, which were denied. C. Tr., 723, 725.

Miss Lee and Lee Inc. filed a timely Notice of Appeal on June 23, 1969. C.Tr. 727.

The Court of Appeals had jurisdiction under Title 28, United States Code, Sections 1291 and 1294 (1) and Rule 73(a) of the Federal Rules of Civil Procedure.

Miss Runge obtained a certificate of copyright, Plaintiff's Exhibit 1, on her book, "Face-Lifting by Exercise", Plaintiff's Exhibit 2, which was copyrighted in 1961. Miss Runge admitted that she was not the sole originator* of the exercises, R. Tr., Vol. 4, 2/6/69,

*Webster's New World Dictionary (College

pp. 433-434, 458-461, 507, 512; R. Tr., Vol. 5, 2/7/69, pp. 563, 569-572, which are basically isometrics. R. Tr., Vol. 4, 2/6/69, page 541. In her brief in the Court of Appeals she admitted that she "delved into books on anatomy that described the muscle structure of the face;" that she "read books on physical therapy, learning from them the benefit of slow-controlled, long-range movements of the muscles;" that she "exchanged information and material that she collected from magazines and newspapers of the day with a few actress friends;" and that they

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*Edition) defines originator as

> "a person or thing that originates something."

It defines originate as

> "to bring into being; especially, to create (something original); <u>invent</u>." (underlining added)

"experimented on each other's faces and practiced muscle movements on the face and neck before one another." Appellee's Brief, pp. 5-6

Prior to publishing her book, Runge authorized Conde Nast Publications to print part of it in the February 15, 1959 issue of Vogue Magazine, Plaintiff's Exhibit 28. Conde Nast obtained a certificate of copyright, defendants' Exhibit AC, in 1959 on that issue of Vogue Magazine. However, Runge did not obtain a copyright on the Vogue article in her name and it did not bear a separate copyright notice in her name.

The opinion of the Court of Appeals, states that: "Runge's agreement with Vogue provided that the magazine acquired only publication rights to the materials and that the copyright was to revert of Runge for all further uses as of January

1, 1960. Thus, Runge was the beneficial owner of the copyright and entitled to unrestricted use of the materials after January 1, 1960." (Appendix B, page 3). This portion of the opinion was lifted from Appellee's Brief (at pages 34-35), which contains no citations to relevant testimony or exhibits. The facts are as follows: Plaintiff's Exhibit 27, a letter from the Managing Editor of Vogue to Runge, dated December 23, 1958, states:

> "This is to confirm in writing our telegrammed correspondence of these past weeks. We are delighted with your face lifting exercises and with your agreement to our plan for buying your manuscript notes and photographs for the sum of $500."

Runge recognized that the copyright in her material belonged to Vogue when she stated in an Affidavit in Opposition

to Defendants' Motion for Summary Judgment* served November 14, 1967, that (at page 2, lines 15-17):

"Since May 1966, I have tried to get a formal re-assignment of copyright from Vogue through my attorney, but I have not been able to do so to this day." Cl. Tr. 211.

Furthermore, Runge's attorney stated in the Memorandum of Points and Authorities in Opposition To Defendants' Motion for Summary Judgment, also served November 14, 1967, that (at page 8, lines 14-17):

"However, plaintiff's inability to obtain a formal re-assignment of such copyright from Vogue forces

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*The Court took judicial notice of the files and Records in the equity case. R. Tr., Vol. 8, 2/26/69, pp. 885-886.

plaintiff to rely solely on the new matter in the copyright for the purposes of this action."

Cl. Tr. 175

In this connection, Mr. C. Coudert Nast, an attorney for Conde Nast, wrote a letter dated November 15, 1961, defendants' Exhibit PO for identification, to Mr. David Savoy, Miss Runge's public relations man, stating:

"Following the publication of the Senta Runge article on face-lifting by exercise in the February 15, 1959 issue of Vogue, our client received a letter from a German woman claiming that the article in Vogue had been appropriated without permission from a booklet written by her. The German author's letter was followed shortly thereafter by a more formal

complaint by the publisher of the German pamphlet. The second letter included a formal complaint for copyright infringement."

The District Court ruled that all inquiry into this matter was irrelevant and immaterial on any issue, including unclean hands and credibility. R. Tr., Vol. 7, 2/11/69, pp. 939-943; R. Tr., Vol. 3, 3/25-26/69, pp. 855-863.

Nevertheless, the jury was permitted to find infringement based solely on the Vogue material.

Cf. the exercises in Runge's book that were the same as in the Vogue article, which included Nos. 8-11, Affidavit of Plaintiff Senta Maria Runge in Opposition to Defendants' Motion for Summary Judgment, filed 11/15/67, C. Tr., 211, Page 5, lines 15-19, with Runge's argument to the jury that Miss Lee had infringed these same exercises, particularly No.10.

R. Tr., Vol. 8, 2/12/69, pp. 975-976

Defendants' Requested Special Instruction No. 9A asked that the jury be instructed that plaintiff had no copyright in the Vogue material. R.T. 489. The instruction was refused and defendants objected to the refusal. R. Tr., Vol. 1, 2/13/69, pp. 72-73.

Runge incorporated and published the Vogue material together with new matter in her book in 1961 with a notice of copyright in her name but without the recordation of any assignment from Vogue, which she never obtained.

Furthermore, Runge concealed the prior publication in Vogue by leaving blank Item 5, "New Matter In This Version," in her certificate of copyright, Plaintiff's Exhibit 1.

Miss Lee hired a professional "rewriter" to make sure that the literary style and arrangement of the words in the

infringing book were original and easily understood. R. Tr., Vol. 3, 2/5/69, pp. 315-317. A side by side, word by word comparison of the two books is contained in Exhibit A to Plaintiff's Answers to Defendants' Interrogatories, filed 1/26/67, C. Tr. 27. These answers clearly show that there was no literal or word-for-word copying. As a typical example, Exhibit A states (at pages 26-27) that Runge's Exercise No. 8 is infringed by Lee's Exercise No. 12A as follows:

Runge Exercise No. 8, Plaintiff's Exhibit No. 2, pp. 96-97	Lee's Exercise No. 12A, Plaintiff's Exhibit 3, pp. 107-109
"For Horizontal Lines on Forehead	
. . .	"PRELIMINARY: . . .
"Assume the	"Position illustra-

position in Picture A (reference to photo at top of page 97)

"1. . . . Press skin onto the bone.

"2. Push the skin up and press the fingers tight onto the bone to hold the resistance.

"3. Against this resistance pull muscles with great force downward as you pull down the eyebrows and [close] eyes tight on the count of 10 seconds in pretrain-

ted by photo on Page 107.

"MAIN EXERCISE:

"1. A. 'Move forehead down, in small, definite steps, . . . against THE RESISTANCE OF THE TAPE ON YOUR FOREHEAD. Then close eyes gently. Now close them tighter and tighter in small

ing . . .(See Picture	definite movements from 5 to 10 - then close them as tightly as possible. (Illustrated by photo on bottom of Page 108.) . . .
"Release muscles to starting position. . . for ten seconds.	"2. Release muscles . . . in gradual, controlled movements, counting back from 10 to 1, . . . in reverse steps." (p. 105)
"Caution . . .be aware that you do not scowl during the performance of this exercise. "Note: . . . frowning must be avoided in order	Hints: Do not scowl (bringing eyebrows inward cause lines between eyebrows and center of forehead)." (P. 107)

to keep the wrinkles
out . . ."

Obviously, the only similarities are the words "position", "muscles", "close eyes", "release muscles" and "do not scowl", words which were required by the similarity of the subject matter.

As a result, Runge had to try her case on the theory that Miss Lee infringed because her book described exercises for the same group of muscles, R. Tr., Vol. 7, 2/11/69, pp. 897-903; R. Tr., Vol. 8, 2/12/69, p. 974, and gave an ordinary person viewing her book the "same idea" as Runge's. R. Tr., Vol. 8, 2/13/69, p. 1047.

The opinion of the Ninth Circuit tacitly admits there was no literal copying in relying on the following language in Universal Pictures v. Harold Lloyd, 162 F. 2d 354, (9th Cir. 1947):

"Copying and infringement may exist, although the work of the pirate is so cleverly done that no identity of language can be found in the two works."

The decision of the Court of Appeals states that (Appendix B, page 5): "The record discloses evidence that appellants' infringement severely damaged the value of the reissue and republication rights of Runge's original book and her sequel."

The only such evidence was the hearsay testimony of Runge that Sherbourne Press refused to publish the manuscript of her sequel because the same exercises were "being advertised in a book for $25 on Channel 13." Said Runge, R. Tr., Vol. 4, 2/6/69, pp. 414-416:

Q. Who is Mrs. Sand?

A. Mrs. Sand was the editor in charge of my manuscript.

Q. At Sherbourne Press?

A. At Sherbourne Press.

Q. Did you have any discussion with Mrs. Sand?

* * *

THE WITNESS: Yes. . . .

Q. And did you meet with Mrs. Sand or did you call her on the telephone?

A. . . .I called Mrs. Sand on the telephone and I asked her -- .

Q. What was said in this conversation?

MR. GREENWALD: Your Honor, I will object to this telephone conversation as calling for hearsay.

THE COURT: The objection is overruled. Everything that is stated is not necessarily hearsay. Now, I don't even know until she testifies what it is, whether it is hearsay. If it is offered for proof of the truth of an issue, it is hearsay. If it is not, it is part

of the conversation, part of what took place and it is admissible.

BY MR. SIEGEL:

Q. Would you please state this conversation in substance, what you said to Mrs. Sand and what she said to you?

A. I said, "Mrs. Sand, I'm shocked about this sudden rejection of the manuscript that you people were first enthused about when everything was right about it and now it is rejected. Would you please be so kind, for my own satisfaction, as to explain to me the reason for it?".

And she said, "Well, we thought these exercises were original."

I said, "They are."

She said, "No, they are not."

I said, "Yes, they are."

She said, "No. These same exercises are being advertised in a book for $25 on Channel 13, something like Scientific Facial Exercises, and these are the same

exercises."

And I said, "I want you to know, Mrs. Sand, that this girl that published this book learned it from me and worked for me for ten months." And I said, "I did not copy from her."

She said, "Well, I'm shocked. I'm sorry to hear this. However, you must realize once a publisher has made up his mind no publisher wants to be second on the market."

That was the end of the conversation. I did send her a package of my creams in appreciation for this information.

THE COURT: Now, this statement is received . . . for the purpose of showing the conversation and statement of Mrs. Sand, the woman with whom Mrs. Runge had the conversation.

Finally, in Plaintiff's Requested Instruction No. 11, filed on May 27, 1968, C. Tr., 324, Runge asked for, and the

Court gave, the following instruction, R. Tr., Vol. 8, 2/13/69, page 1047:

> "You are instructed that an infringing copy is one that gives an ordinary person viewing it the same idea as the original. Copying is not confined to literal repetition . . ." (underlining added)

F. Direct and Concise Argument Amplifying the Reasons Relied On For Issuance Of The Writ

The Court should issue the writ as to questions (1) and (2) for the following reasons:

. This Court has repeatedly held that the validity of patents depends upon the standard expressed in Article I, Section 8, Clause 8, of the United States Constitution, that is, whether the patents "promote the progress of science and useful arts."

Graham v. John Deere, 383 U. S. 1, 148 USPQ 459, 462 (1966);

Anderson's-Black Rock, Inc. v. Pavement Salvage, 396 U.S. 57, 163 USPQ 673, 674-675 (1969).

In Graham v. John Deere, supra, this Court said (at page 462):

> 2 At the outset it must be remembered that the federal patent

power stems from a specific constitutional provision which authorizes the Congress "To promote the Progress of * * * useful Arts, by securing for limited Times to * * * Inventors the exclusive Right to their * * * Discoveries * * *." Art. I, Sec. 8.[1] The clause is both a grant of power and a limitation. This qualified authority, unlike the power often exercised in the Sixteenth and Seventeenth Centuries by the English Crown, is limited to the promotion of advances in the "useful arts." It was written against the backdrop of the practices-eventually curtailed by the Statute of Monopolies- of the Crown in granting monopolies to court favorites in goods or businesses which had long before been enjoyed by the

public. See Meinhardt, Inventions, Patents and Monopoly, pp. 30-35 (London, 1946). The Congress in the exercise if the patent power may not over-reach the restraints imposed by the stated constitutional purpose. Nor may it enlarge the patent monopoly without regard to the innovation, advancement or social benefit gained thereby. Moreover, Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available. Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must "promote the Progress of * * * useful Arts." This is

the standard expressed in the Constitution and it may not be ignored. And it is in this light that patent "validity requires reference to a standard written into the Constitution." A. & P. Tea Co. v. Supermarket Corp., supra, at 154, 87 USPQ at 306.

Logically, this language should be equally applicable to the grant of copyrights since both the patent power and the copyright power stem from the same constitutional provision. Nimmer on Copyright, Section 10.1, page 33, fn. 7a. But see Note, Constitutional Limits on Copyright Protection, 68 Harv. L. Rev. 517 (1955). Yet, this Court has never decided this important question of federal law, that is, whether a copyright must meet the same constitutional standard as a patent.

The lower courts for some reason have consistently ignored the constitutional

standard in copyright cases and the Court of Appeals below specifically refused to apply it after it had been called to their attention. Said the Court of Appeals in this case (at page 3 of Appendix B):

> "The standard of 'novelty' urged by appellants is applicable to patents, but not to copyrights. The copyright standard is one of 'originality'."

Cf. Nimmer on Copyright, Section 10.1.

In holding that there was sufficient evidence of originality, the Court merely held that there was sufficient evidence that Runge was the "author." Nimmer on Copyright, Sections 6.1 and 10

Petitioners believe that this is an especially appropriate case for deciding whether the constitutional standard applicable to patents is also applicable to copyrights and, if so, whether the

copyrighted work of Runge meets the test, because Runge's book is a non-dramatic work which describes methods or process for removing facial wrinkles due to aging, comprising the performing in steps of various exercises on the face. Therefore, these processes are within the scope of Section 101 of Title 35, United States Code, which provides that:

> "Whoever invents or discovers any new and useful process, . . .or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title."

However, Runge did not attempt to patent the exercises and they went into the public domain. See Baker v. Selden, 101 U.S. 99 (1879) (at page 102):

> "To give the author of the book an exclusive property in the art described therein, when

no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters patent, not of copyright. The claim to an invention or discovery of an art of manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained; and it can only be secured by a patent from the government."

Unless Runge's copyrighted work is subjected to the same test as a patent she will nevertheless have succeeded in "restrict[ing] free access to materials already abailable" by preventing others, particularly Joyce Lee, from using their own literary styles to describe or perform the same exercises.

Another constitutional requirement

of Article I, Section 8, Clause 8, is that the protected work of an author be a "writing." Since the Joyce Lee book is not a literal copy, the judgement extended protection to more than a writing; it extended the protection to a system or format for describing unpatented facial exercise, which is not protectible. Nimmer on Copyright, Section 8.5.

In this connection, the Court of Appeals relied on Universal Pictures v. Harold Lloyd, 162 F. 2d 354 (9th Cir. 1947), a case involving a dramatic work which held that identity of language was not necessary for copyright infringement. This Court should decide whether or not the application of such law in this case, involving a non-dramatic work, without a plot, characters or story, goes beyond the constitutional grants of protection for "writings." Otherwise, free competition in ideas will continue to be hampered by undue

extension of the copyright monopoly.

The statement of the Court of Appeals that "Appellants failed to attack the copyright's validity at trial" (at page 3 of Appendix B) is not correct. Joyce Lee submitted a multitude of jury instructions relating to validity, which were refused. See, e.g., Defendant's Requested Special Instruction No. 1B, which was not given and the failure to give was objected to. R. Tr., Vol. 1, 2/13/69, page 72-73.

The Court should issue the writ as to question (3) because the law relating to the divisibility of copyrights and the factual distinctions between a license and an assignment is in hopeless disarray. See Nimmer on Copyrights, Section 119. Furthermore, this Court has not spoken on the subject since Mifflin v. R.H.White, 190 U.S. 160 (1903).

The Court should issue the writ as to question (4) because this Court has

never interpreted Section 32 of Title 17, United States Code. In Group Publishers v. Winchell, 86 F. Supp. 573, 83 USPQ 461 (S.D.N.Y. 1949) and other cases, the Courts have universally held that publication of a work with a copyright notice in the name of the assignee (here Runge) before recordation of the assignment from the assignor (here Vogue) renders the notice defective and injects the work into the public domain. See Nimmer on Copyright, Section 123.4. Also, the decision of the Court of Appeals ignored this long line of authority and therefore has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

The Court should issue the writ as to question (5) because again the dec-

ision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision. See International Boitical v. Associated Mills, 239 F. Supp. 511, 514 144 USPQ 577 (N.D. Ill. 1964)

The Court should issue the writ as to question (6) because the decision of the Court of Appeals for the Ninth Circuit is in conflict with the decisions of the Second Circuit in Chautauqua School of Nursing v. National School of Nursing, 211 Fed. 1014 (W.D.N.Y. 1914) rev'd, 238 Fed. 15 (2d Cir. 1916) and Brief English System v. Owen, 48 F. 2d 555, 9 USPQ 20 (2d Cir. 1931). The Second Circuit cases answered question (6) in the negative, even where, as in the Chautauqua case, there was admitted

access. In Continental Casualty v. Beardsley, 151 F. Supp. 28, 32, 113 USPQ 181, 183-184 (S.D.N.Y. 1957), aff'd. 253 F. 2d 702, 117 USPQ 1 (2d Cir. 1958), cert. denied, 358 U.S. 816, 119 USPQ 501 (1958), Judge Palmieri relied on these Second Circuit cases in making the following statement (at pages 31-32):

> "The general purposes of copyright protection are to afford authors the right to reap the fruits of their expression and to promote the store of information and objects of culture available for public enjoyment and application. Where, however, an author's monopoly threatens to infringe unduly on public use of the ideas or objects of that expression, the courts have demonstrated flexibility in adjusting the conflicting theories.

> Thus copyrightability may be altogether denied, or, if copyright is upheld, restrictively protected by requiring almost verbatim copying to constitute infringement. In other situations, the subject and purpose of copyright may be explicitly defined so as not to authorize an overgeneralized monopoly which would restrict fair use of the disclosed information or objects."

This Court should approve these words and apply them to this case to find no infringement as a matter of law. See Nimmer on Copyright, Section 138, which states:

> ". . .The Court may compare the two works and render a judgment for the defendant on the ground that as a matter of law a trier of fact would not be permitted to

find substantial similarity."

The Court should issue the writ as to question (7) because the decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court as to call for an exercise of the Court's power of supervision.

The $80,000 verdict for copyright infringement was based solely on the hearsay testimony of Runge relating to her conversation with Mrs. Sands at Sherbourne Press, which testimony certainly surprised defendants. Elementary rules of evidence require that plaintiff should have been required to call Mrs. Sands so that defendants would have had an opportunity to cross-examine her on the reasons why Sherbourne Press refused to publish Runge's sequel, especially in view of the fact that Runge's original book

was of doubtful merit, having sold only 1,000 copies, R. Tr., Vol. 5, 2/7/69, page 579, and was out of print long before defendants published their infringing book. R. Tr., Vol. 5, 2/7/69, pp. 635-636. In this connection, the only documentary evidence in the subject did not mention defendants or their book. In a letter from Sherbourne Press to Runge, dated March 28, 1966, plaintiff's Exhibit 33, Mrs. Sands said:

> "I am returning to you under separate cover your manuscript AGELESS BEAUTY THROUGH MODERN SCIENCE which you submitted to us for consideration. I am sorry that we cannot offer you a contract on this, but there is no way that I could include your work in our projected lists.
>
> "I suggest that you submit this work to a publisher of paper-

back books and wish you every success.

"Thank you for your interest in Sherbourne Press."

The Court should issue the writ as to question (8) because the jury was instructed that a copyright covers an idea itself, which is in conflict with the applicable decisions of this Court. For example, in Mazer v. Stein, 347 U.S. 201, 100 USPQ 324, 333 (1954), this Court held that a copyright does not protect "the idea itself." See also Lear v. Adkins, 395 U.S. 653, 162 USPQ 1, 3, 7, 9 (1969) [there is a "strong federal policy favoring free competition in ideas which do not merit patent protection;" "federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent;" "there is a strong federal policy favoring the full and free use of ideas in the public domain"].

Respectfully submitted,

MAHONEY, HORNBAKER & SCHICK
ROBERT D. HORNBAKER
401 Wilshire Boulevard
Santa Monica, California
90401

Robert D. Hornbaker

CERTIFICATE OF SERVICE

It is hereby certified that three copies of the foregoing Petition for Certiorari have been served this 4th day of June, 1971 on Irwin O. Spiegel, Attorney for Respondent, by depositing same in a United States post office or mail box, with first class postage pre-paid, addressed to said counsel of record at his post office address of 6380 Wilshire Boulevard, Los Angeles, California 90048.

Robert D. Hornbaker

because Church's extensive use of the word "Independent" sufficiently distinguished his business from those affiliated with appellant. The District Court also found that the terms "Volkswagen Service" and "VW Service" did not belong exclusively to Volkswagen, but have "come to mean in the mind of the public only that the advertiser services Volkswagen vehicles." (Finding of Fact No. 35.) Volkswagen contends that these findings, and the conclusions based thereon, are erroneous.

[1] It is not disputed that Church may specialize in the repair of Volkswagen vehicles. He may also advertise to the effect that he does so, and in such advertising it would be difficult, if not impossible, for him to avoid altogether the use of the word "Volkswagen" or its abbreviation "VW," which are the normal terms which, to the public at large, signify appellant's cars. Cf. Dodge Bros. v. East, 8 F.2d 872, 876-77 (E.D. N.Y. 1925). But these terms are not public property; they are registered trademarks. The goodwill inherent in them is Volkswagen's property. If another uses the marks in a manner which tends to deceive the public, Volkswagen is entitled to protection. Mershon Co. v. Pachmayr, 220 F.2d 879, 883, 105 USPQ 4, 7 (9th Cir. 1955). Although he may advertise to the public that he repairs appellant's cars, Church must not do so in a manner which is likely to suggest to his prospective customers that he is part of Volkswagen's organization of franchised dealers and repairmen. Ford Motor Co. v. Helms, 25 F.Supp. 698, 40 USPQ 33 (E.D. N.Y. 1938); Yale & Towne Mfg. Co. v. Haber, 7 F.Supp. 791, 792, 22 USPQ 246, 247 (E.D. N.Y. 1934); see Dodge Bros. v. East, supra at 877.

The question of whether Church's business was adequately distinguished from appellant's is one of fact. Each case of this type must be decided on its own facts, see Fleischmann Distilling Corp. v. Maier Brewing Co., 314 F.2d 149, 160, 136 USPQ 508, 518 (9th Cir. 1963).

In this case, on the basis of all of the facts and circumstances, we hold that the factual determinations of the District Court were not clearly erroneous. We cannot, therefore, overturn the decision that, in the light of the particular circumstances, Church's prominent use of the word "Independent" whenever the terms "Volkswagen" or "VW" appeared in his advertising was sufficient to distinguish his business to the eye of the customer " 'exercising that care, caution and power of perception which the public may be expected to exercise in the matter which it has in mind.' " National Van Lines v. Dean, 237 F.2d 688, 692, 111 USPQ 165, 168 (9th Cir., 1956), quoting American Automobile Ass'n v. American Automobile Owners' Ass'n, 13 P.2d 707, 710, 14 USPQ 263, 266 (Cal. 1932). It was appropriate for the District Court to weigh all of the pertinent factors. The size, style and appearance of the advertising articles and displays were among these factors. Another was the fact that Church did not use Volkswagen's distinctive lettering style or color scheme, nor did he display the encircled "VW" emblem. Under this view of the case, we need not reach the question whether the phrases "Volkswagen Service" and "VW Service" have become so identified in the public mind with appellant that their use by others constitutes unfair competition.

[2] Volkswagen further contends that the trial court erred in failing to enjoin Church's unlawful past practice of using "Volkswagen" as part of his business name, although he had abandoned this usage at the time of trial. There is little or no evidence in the record casting doubt on Church's good faith abandonment of this infringement, or indicating that it will be resumed, and thus we are unable to say that the District Court erred in refusing such an injunction. Fram Corp. v. Boyd, 230 F.2d 931, 934, 109 USPQ 4, 5-6 (5th Cir. 1956).

The judgment is affirmed.

District Court, C. D. California

RUNGE v. LEE et al.

No. 66-831 WB Decided Apr. 21, 1969

COPYRIGHTS

1. Accounting — Damages — Copyrights (§ 11.253)

Copyright proprietor is entitled to award of the higher amount of her damages or infringer's profits.—Runge v. Lee (DC CCalif) 161 USPQ 770.

Action by Senta Maria Runge against Joyce Lee and Joyce Eve Lee Cosmetics, Inc., for copyright infringement and unfair competition. Judgment for plaintiff.

IRWIN O. SPIEGEL, Los Angeles, Calif., for plaintiff.

ROBERT D. HORNBAKER and MAHONEY, HORNBAKER & SCHICK, both of Los Angeles, Calif., for defendants.

BYRNE, District Judge.

APPENDIX "A"

This cause for copyright infringement and unfair competition having been tried before a jury on February 3, 4, 5, 6, 7, 10, 11, 12, 13, 14 and 17, 1969, and the jury having found for the plaintiff, Senta Maria Runge, and against defendants Joyce Lee and Joyce Eve Lee Cosmetics, Inc. for copyright infringement and having awarded plaintiff damages therefor against said defendants in the amount of $80,000.00, and the jury having further found for plaintiff and against said defendants for unfair competition and having awarded plaintiff damages against said defendants in the amount of $40,000.00 therefor, and in addition the jury having found that plaintiff is entitled to an award of punitive damages by way of example for unfair competition and having assessed punitive damages therefor against defendant Joyce Lee in the amount of $25,000.00 and against defendant, Joyce Eve Lee Cosmetics, Inc. in the separate and further amount of $20,000.00, and defendant Joyce Lee having withdrawn her counterclaim, and the matter having come on before the Court on March 24, 25, 26 and 27, 1969, for an accounting of profits for copyright infringement and injunctive relief and other remedies incidental thereto, plaintiff being represented by her attorney, Irwin O. Spiegel in such proceeding, and said defendants being represented by their attorney, Robert D. Hornbaker of Mahoney, Hornbaker and Schick, and the Court having heard evidence relating thereto and having considered the briefs and argument of counsel, and being fully advised in the premises, does now, therefore, make the following Findings of Fact and Conclusions of Law in respect to said matters, to wit:

Findings of Fact

I. The Court has jurisdiction of this matter under Title 28, Section 1338(a) and the Copyright Act of March 4, 1909, as amended, and enacted by Title 17 of the United States Code July 30, 1948, as amended, and Sections 101(a), (b), (c), (d) and 116 of Title 17 in respect to remedies for copyright infringement; and the Court has jurisdiction under Title 28, Section 1338(b) of the United States Code in respect to injunctive relief for unfair competition.

II. Based upon the stipulation of plaintiff and defendants, evidenced by defendants' Exhibit No. PD, the Court finds that the net infringing profits made by defendant Joyce Eve Lee Cosmetics, Inc. in the sale of defendants' infringing book entitled "The Joyce Lee Method of Scientific Facial Exercises" are in the amount of $64,253, computed as follows:

GROSS SALES		$180,485.00
Cost of Sales and Production		35,657.00
Gross Profit		$144,828.00
Overhead Expenses:		
Salaries	$16,311.00	
Supplies	2,834.00	
Legal and Audit	2,500.00	
Insurance	1,812.00	
Interest	916.00	
Office and Postage	10,636.00	
Advertising & Promotion	16,821.00	
Rent	8,176.00	
Taxes and Licenses	5,363.00	
Telephone	1,945.00	
Utilities	412.00	
Travel and Auto	10,836.00	
Depreciation	2,013.00	
TOTAL COSTS		$ 80,575.00
INFRINGING NET PROFIT		$ 64,253.00

III. The Court finds that defendants have 11,158 copies of said infringing book, "The Joyce Lee Method of Scientific Facial Exercises," in defendants' possession or under their control.

IV. The Court finds that defendants threaten and intend to continue to print, reprint, copy and sell defendants' said infringing book unless enjoined and restrained by order of this Court or the Court further finds that defendants threaten and intend to continue falsely and misleadingly to represent defendant Joyce Lee as the originator of exercises for the face, copied by defendants from plaintiff's book entitled "Face Lifting by Exercise", unless enjoined and restrained by order of this Court; and that defendants further threaten and intend to continue falsely and misleadingly to represent that the change in appearance of one Margaret Kaumlen, depicted in photographs and words relating thereto on the outside of the book cover of defendants' said infringing book and on frontis-pages x and xi therein, was the result of using the facial exercises contained in defendants' said book for the period of five months, unless enjoined and restrained by order of this Court.

V. The Court finds that plaintiff is entitled to a reasonable attorney fee as part of her costs in the prosecution of her claim for copyright infringement.

CONCLUSIONS OF LAW

[1] I. Inasmuch as the damages awarded to plaintiff by the jury for infringement of copyright in the amount of $80,000 are larger than the net infringing profits of defendant Joyce Eve Lee Cosmetics, Inc. in the amount of $64,253, plaintiff is entitled to an award of the higher of the two—that is, damages in the amount of $80,000 for copyright infringement against defendants and each of them. Universal Pictures Co., Inc. v. Harold Lloyd Corp., 162 F.2d 354, 73 USPQ 317 (9th Cir., 1947).

II. Plaintiff is entitled to an injunction permanently enjoining and restraining defendants and each of them and said defendants' officers, employees, agents, successors, affiliates, assigns, licensees, and each of them, from printing, reprinting, copying or vending defendants' said infringing book entitled "The Joyce Lee Method of Scientific Facial Exercises" or any version thereof that copies copyrightable subject matter from plaintiff's book entitled "Face Lifting by Exercise." Said injunction shall furthermore enjoin defendants and each of them, and said defendant's officers, employees, agents, successors, affiliated, assigns, licensees, and each of them, from representing publicly by written or oral utterances or statements that state in words or in substance that defendant Joyce Lee originated any of the exercises for the face contained in plaintiff's said book, "Face Lifting By Exercise." Said injunction shall furthermore permanently and absolutely enjoin and restrain defendants and each of them, and said defendants' officers, employees, agents, successors, affiliates, assigns, licensees, and each of them, from any further use of the comparative photographs of said Margaret Kaumlen appearing on the outside book cover and within defendants' said book, together with any statement or utterance in writing or orally, in words or substance that the change in appearance of said person depicted therein is the result of the use of any or all of the exercises for the face contained in defendant's said book, that were copied from plaintiff's said book. Title 17, Section 101(a), California Civil Code, Section 3369; O'Jala v. Bohlin, 178 Cal.App.2d 292.

III. Defendants shall deliver said 11,191 infringing copies of defendants' said book, "The Joyce Lee Method of Scientific Facial Exercises", to the Clerk of this Court forthwith and all transcripts, photographs and other matter used in connection with the production thereof, together with an affidavit stating that delivery constitutes all such books and such other matter; and the Clerk shall impound and keep said books and said other matter until the Judgment herein has become final; and when the Judgment has become final, the Clerk shall destroy the same. Title 17, Section 101(c)(d).

IV. Plaintiff shall be entitled to a reasonable attorney fee in the amount of $12,000 as part of her costs in this action for copyright infringement.

District Court, C. D. California

NORTHROP ARCHITECTURAL SYSTEMS v. FULLVIEW INDUSTRIES, INC., et al.

No. 67-1817-R Decided Apr. 25, 1969

PATENTS

Particular patents—Closure

2,913,046, Sharp and Frymire, Sliding Closure Construction, claim 3 invalid; claims 6, 7, 9, 10, 15, and 16 not infringed.—Northrop Architectural Systems v. Fullview Industries, Inc. (DC CCalif) 161 USPQ 772.

Action by Northrop Architectural Systems against Fullview Industries, Inc., United States Aluminum Corporation, International Window Corp., Lupton Manufacturing Co., and Premiere Aluminum Products, Inc., for patent infringement. On motion by Fullview Industries, Inc., for summary judgment. Motion granted.

MIKETTA, GLENNY, POMS & SMITH, WILLIAM POMS, and PAUL ADAMS, all of Los Angeles, Calif., for plaintiff.

FULWIDER, PATTON, RIEBER, LEE & UTECHT, FRANCIS A. UTECHT, and J. F. MCLELLAN, all of Long Beach, Calif., for Fullview Industries, Inc.

REAL, District Judge.

This consolidated cause came on for hearing on defendant's Lupton Manufacturing Co.'s Motion for Summary Judgment and on the prior joint Motion of United States Aluminum Corporation et al. and Fullview Industries, Inc. and the present Motion For Summary Judgment by Fullview Industries, Inc., adopted by United States Aluminum Corp., et al., after due consideration based upon its consideration of said motions, this Court now finds the facts and states the conclusions of law as follows:

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SENTA MARIA RUNGE,
Plaintiff-Appellee,

v.

JOYCE LEE and JOYCE EVE LEE COSMETICS, INC., a corporation,
Defendants-Appellants.

No. 24,664

[March 26, 1971]

Appeal from the United States District Court
Central District of California

Before: MERRILL, CARTER and KILKENNY, Circuit Judges

JAMES M. CARTER, Circuit Judge.

Runge filed suit against appellants Joyce Lee (hereafter Lee) and Joyce Eve Lee Cosmetics, Inc., (hereafter Lee Cosmetics) on related claims of copyright infringement and unfair competition pursuant to 28 U.S.C. §§ 1338 (a) and (b). Runge waived a jury trial, but the appellants demanded one. The jury awarded Runge: (a) $80,000.00 as compensatory damages for copyright infringement against Lee and Lee Cosmetics; (b) $40,000.00 as compensatory damages for unfair competition against Lee and Lee Cosmetics; (c) $25,000.00 as punitive damages for unfair competition against Lee; and (d) $20,000.00 as punitive damages for unfair competition against Lee Cosmetics. Thereafter, the district court judge determined, pursuant to stipulation, that the net profits from infringement were $64,253.00. The court elected, however, to award Runge the $80,000.00 as compensatory damages for infringement, instead of the amount of profits. The district court also granted Runge $12,000.00 for attorneys' fees, issued a permanent injunction against further copyright infringement or acts of unfair competition, and ordered the remaining copies of Lee's infringing book im-

BEST AVAILABLE COPY

pounded and destroyed. Judgment was entered accordingly. Lee and Lee Cosmetics appeal. We affirm.

Background:

Runge opened a salon in Los Angeles in 1957, where she instructed clients in facial exercise. In 1959, Runge wrote an article for *Vogue Magazine* describing her exercises, which became part of a book [*Face Lifting by Exercise*] that she published and copyrighted in 1961. Lee was a former interior decorator whose hobby was apparently the study and practice of facial exercise. In 1962, Lee was employed by Runge and was coached by her in facial exercise techniques. Lee gave exercise instructions at Runge's salon for about nine months, during which time she admittedly read and studied Runge's book thoroughly. In 1963, Lee left Runge's employ and opened her own salon in Los Angeles. In 1965, Lee published the allegedly infringing book—*The Joyce Lee Method of Scientific Facial Exercises.*

Runge's book contained verbal descriptions of various facial exercises, accompanied by illustrative photographs. The book sold approximately 1000 copies at $5.95, the last of which was sold in 1962. Lee's book also described various facial exercises, including virtually all those presented in Runge's book. Lee's book was quite elaborate and sold about 8000 copies at $25.00. During 1965, Runge was preparing for publication a sequel to her original book. Runge learned of Lee's literary endeavors only after her "sequel" manuscript was rejected by various publishers because Lee's book would be on the market first.

The Issues:

Appellants raise a multitude of issues, some of which we discuss later herein. We note at the outset that, by electing a jury trial, appellants have made it impossible to have the careful findings of fact and conclusions of law that would have been available to us had the trial been to the court. Instead, we have in the record the general verdicts of the jury and the instructions of law given by the court to the jury. These verdicts and instructions have become, in substance, the equivalent of findings of fact and conclusions of law. If there was sufficient evidence before the jury on a particular issue, and if the instructions of law on that issue were correct, then the jury's verdict must stand.

The major issues in the case are:

(1) Was the copyright valid; did appellants infringe; was there sufficient evidence of damage?

(2) Did appellants engage in unfair competition; was there sufficient evidence of damage?

(3) Was there error in the instructions to the jury?

Numerous secondary issues are presented and some of them will be discussed in the treatment of the issues listed above.

A. *Copyright Validity Issues:*

Appellants assert on appeal that Runge's copyright is invalid because: (1) the book lacked the element of "novelty"; and, (2) Runge failed to disclose in her copyright application the fact that portions of the book had been previously copyrighted by *Vogue Magazine*. Appellants failed to attack the copyright's validity at trial, but we will nevertheless consider the contention.

The standard of "novelty" urged by appellants is applicable to patents, but not copyrights. The copyright standard is one of "originality":

> "The requirements for the 'originality' necessary to support a copyright are modest. The author must have created the work by his own skill, labor and judgment, contributing something 'recognizably his own' to prior treatments of the same subject. However, neither great novelty nor superior artistic quality is required."

Doran v. Sunset House Dist. Corp., (S.D. Cal. 1961) 197 F. Supp. 941, 944, aff'd (9 Cir. 1962) 304 F.2d 251. There was sufficient evidence before the jury to support a finding that Runge's book satisfied the originality requirement.

Runge's agreement with *Vogue* provided that the magazine acquired only publication rights to the materials and that the copyright was to revert to Runge for all further uses as of January 1, 1960. Thus, Runge was the beneficial owner of the copyright and entitled to unrestricted use of the materials after January 1, 1960. See, *Witmer v. Harold Lloyd Corp.* (S.D. Cal. 1930) 46 F.2d 792, 795; *Goodis v. United Artists Television Inc.*, (2 Cir. 1970) 165 USPQ 3, reversing 278 F.Supp. 122 (S.D.N.Y. 1968).

Also, Runge's book contained substantial new matter not contained in her 1959 article. Therefore, the notice of copyright in the 1961 book represented complete compliance with the Act's requirements [17 U.S.C. § 7]. *See e.g., Wrench v. Universal Pictures Co. Inc.,* (S.D.N.Y. 1952) 104 F.Supp. 374. There was certainly no evidence that Runge's application was intended to or did in fact deceive or mislead anyone. Accordingly, we must conclude that Runge's omission, if any, was innocuous and did not render the copyright invalid. *Wrench, supra.*

B. *Copyright Infringement Issues:*

Assuming that Runge's copyright is valid, appellants contend that Lee's book was a *de minimus* infringement or merely "fair use" of Runge's materials. The record indicates that Lee's book contained all 16 of the exercises described in Runge's book, but presented only one completely different facial exercise.

Chautauqua School of Nursing v. National School of Nursing (2 Cir. 1916) 238 Fed. 151, relied on by appellants, contains the general principles of copyright law. (1) "There cannot be exclusive property in a general subject"; (2) "The rights of any person are restricted to his own individual production"; (3) One has "a right to consult all previous publications on the subject"; and (4) "the question is whether the writer has availed himself of the earlier writer's work without doing any independent work himself"; or put differently, is the "production the result of independent labor or copying". (238 Fed. at 153).

As stated in *Universal Pictures Co., Inc., v. Harold Lloyd Corporation* (9 Cir. 1947) 162 F.2d 354,

> "Complete or substantial identity between the original and the copy is not required. Copying and infringement may exist, although the work of the pirate is so cleverly done that no identity of language can be found in the two works."

Lee had access to Runge's book when she wrote her book. She was entirely familiar with the exercises as practiced by Runge. Lee's only published writing was an article in a newspaper on interior decorating. But Lee was able to write her book in one month during parts of November and December 1964. The complete manuscript was ready for printing in July 1965.

We have examined the court's instructions on the matter of copyrights and infringement, and cannot find them erroneous. The

court gave instructions favorable to appellants' theories, based in the main on appellants' requested instructions. These instructions read: "The law allows anyone the right to publish and copyright a new treatment of a subject; and a similarity of form or impression between the two different writers which necessarily follows due to the nature of the subject matter or idea being conveyed is allowable and permissible. A new treatment of a subject matter that demonstrates *its independent production, or using a prior work, as a model, is allowable and not an unlawful copy.* If you find that a subsequent writer *used her own labors, skills or common sources of knowledge open to all men,* and that the resemblances are accidental, or arise from the nature of the subject matter, this does not amount to a wrongful copying . . .". [Emphasis added]

One of the issues before the jury was whether Lee by her own labors had made an independent treatment of the subject matter, or whether she had copied from Runge's book and relied on Runge's labors. The jury found on this against the appellants. We sustain its verdict.

Appellants also attack the adequacy of the evidence supporting the jury's determination of damages from infringement. The record discloses evidence that appellants' infringement severely damaged the value of the reissue and republication rights of Runge's original book and her sequel. It is expressly provided in 17 U.S.C. § 1, that a person upon complying with the provisions contained in Title 17, shall have the exclusive right "(a) . . . to reprint . . . the copyrighted work", and "(b) . . . make any other version thereof . . .".

Runge testified that the value of her labor in writing the sequel was $20,000.00 (computed at $15 an hour), and that the value of publication rights for reissuance or continuation of her exercises was at least $100,000.00 (based on past experience). Credible testimony by the owner of literary property regarding its value can provide an adequate evidentiary basis for an award of damages. *Universal Pictures Co., Inc. v. Harold Lloyd Corp.* (9 Cir. 1947) 162 F.2d 354. The trial judge determined, pursuant to appellants' stipulation, that infringing profits amounted to $64,253.00 but elected to award Runge the jury's determination of $80,000.00 for compensatory damages from infringement. 17 U.S.C. § 101. Such an election is properly within the court's discretion. See *Universal*

Pictures, supra. Thus, appellant's attack on the adequacy of the record to support the damages awarded is without merit.

C. *Unfair Competition Issues:*

The unfair competition claims were based upon: (1) Lee having held herself out as the creator or originator of the facial exercises in question; and (2) Lee's use of deceptive "before" and "after" photographs on the cover of her book and in her promotional materials. It is important to note that since there were no findings in this jury tried case, and since the jury did not return special verdicts, we must sustain the jury's determination if *either* of the claims is legally sound and supported by adequate proof.

Appellants' first attack the jury's implicit finding that Runge was the originator of the facial exercises. Lee contends that there is no evidence that Runge did in fact originate the exercises and that, even if there were, such an interest is not legally protected. The court gave what we believe is a proper statement of the law, to-wit:

> "Where there is a secondary meaning or public identification between an author and a certain work or program and another person falsely represents that she is the originator of such work or program resulting in confusion of authorship, such representations constitute unfair competition."

See, e.g. Ojala v. Bohlin (1960) 178 Cal.App. 2d 292.

There was ample evidence from which the jury could have concluded that Runge was the creator or originator of the facial exercises. The record reflects that Lee refers to herself as the creator or originator of these exercises on numerous occasions in her book and promotional materials. Thus, there is sufficient evidence to support the jury's finding of unfair competition on this ground.

On the back cover of Lee's first edition and again on pages X and XI, there were two photographs of Margaret Kaumlen together with the following statements: "These photographs of Margaret Kaumlen at the age of 55 years [were] taken at an interval of five months. This transformation was the result of using the Joyce Lee method of scientific facial exercises". In Lee's second edition of her book, the statement was modified as follows: "Here on the right is the same Margaret Kaumlen at the age of 52, the startling transformation

was the result after five months of faithfully following the Joyce Lee method". These "before" and "after" photos were also used extensively in Lee's promotional materials and activities. Runge claimed these statements were false and misleading, and damaged her business reputation because she could not truthfully represent to prospective clients that her techniques would achieve similar results.

At trial, there was evidence that: (1) the "before" picture was a passport photo taken many years prior to the "after" picture; (2) the "after" photo was taken after Kaumlen had been performing the Lee exercises for only five months; but, (3) the "remarkable results" displayed in the "after" photo might also be attributable to facts shown by testimony in the record of the retouching of the photo negative, the wig worn by Kaumlen, and/or the slight cosmetic surgery that Kaumlen had undergone in the interim. On these facts, the jury could reasonably conclude that appellants' use of these photos constituted unfair competition.

Appellants also contend that the jury's award of $40,000.00 in compensatory damages for unfair competition was not supported by adequate evidence in the record. The record contains evidence that appellants' claims caused public confusion regarding the true originator of the exercises. Also appellants' "before" and "after" representations suggested results that Runge was forced to tell prospective clients could not be obtained by her methods. It seems inevitable that Runge's business and reputation would suffer as a consequence of these representations. Runge testified that she had lost many salon customers to appellants and her sales of related cosmetics had declined as a result of appellants' representations. Accordingly, we conclude that appellants' contention that there is insufficient evidence to support the jury's verdict is without merit.

D. Other Contentions:

Appellants contest the jury's award of punitive damages for unfair competition. The court's instructions were both legally sound and very explicit in setting forth the factual elements that the jury would have to find in order to award punitive damages. The determination that appellants' acts were wanton and malicious was

within the exclusive province of the jury. On this record, we cannot say that the jury's determination was erroneous.

Appellants attack the court's inclusion and exclusion of certain evidence. Having carefully reviewed these evidentiary rulings, we conclude that most of the rulings were entirely correct, and those that were arguably incorrect did not result in prejudice to appellants in view of the weight of other evidence in the record. We find no error.

Appellants assert that several of the court's instructions to the jury were incorrect statements of the law. We have reviewed these contested instructions and conclude that appellants' complaints are without merit.

Finally, the awarding of $12,000 attorney's fees was not improper. 17 U.S.C. § 116 provides that the court "may award to the prevailing party a reasonably attorney's fees as part of the costs." The patent cases cited by appellants are not applicable. The language of the old statute pertaining to patent cases, 35 U.S.C. § 70 (1946) and the new statute, 35 U.S.C. § 285 (1952) read differently from the copyright statute and do not control copyright cases.

The judgment of the district court is affirmed.

ARCATA GRAPHICS, SAN FRANCISCO 3-30-71—360

LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971
No. 1808

70-2331

JOYCE LEE and JOYCE EVE LEE, COSMETICS, INC.,
Petitioners,

vs.

SENTA MARIA RUNGE,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 1808

JOYCE LEE and JOYCE EVE LEE, COSMETICS, INC.,
Petitioners,

vs.

SENTA MARIA RUNGE,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

I.
Opinions Below.

The opinion of the Court of Appeals for the Ninth Circuit is unofficially reported in 169 U.S.P.Q. 388, attached hereto as Appendix 1. Petition makes reference to the "opinion" of the District Court, unofficially reported in 161 U.S.P.Q. 770, as being attached to the Petition as Appendix A (hereinafter referred to as "Pet.", p. 1); but petitioners only attached the District Court's Conclusions of Law as Appendix A and omitted therefrom the District Court's Findings of Fact as a part thereof. Respondent is therefore attaching as Appendix 2 hereto, a true and correct copy of the District Court's Findings of Fact and Conclusions of Law (as unofficially reported in 161 U.S.P.Q. 770) in respect to the proceedings that came before that Court for an accounting of profits for copyright infringement, injunc-

tive relief and other remedies incidental thereto, after the jury brought in its verdict herein against petitioners for copyright infringement and unfair competition.

II.
Counter Statement of Case.

The "Concise Statement of the Case" in petitioners' argument (Pet. pp. 10-28) distorts the nature of the proceedings at trial and omits mention of material facts which are necessary to the consideration of the questions presented here. Respondent will attempt to provide the Court with a more comprehensive summary of the nature and substance of this case in the following summary:

A. PROCEEDINGS BELOW.

1. Jury Trial Was at the Request of Petitioners.

Respondent initially requested trial by jury both in Respondent's Complaint (Clerk's Transcript, hereinafter referred to as "C. T.", p. 2) and in Respondent's First Amended Complaint [C.T. pp. 79, 89].

Thereafter, Respondent waived a jury trial; but Petitioners refused to accede in such waiver asserting their reliance upon respondent's prior jury request [C. T. p. 429]; and it was petitioners who ultimately demanded and got a jury trial on all issues of fact [C. T. p. 451, lines 14-15].

Petitioners' "Statement" misleadingly implies that this case was tried to a jury at the request of respondent (Pet. p. 10).

The case then proceeded to trial on February 3, 1969, and was tried to a jury on eleven successive

Court days, the jury returning its verdict in favor of respondent and against petitioners on February 17, 1969 [C. T. p. 557]. The jury awarded respondent $80,000.00 damages for copyright infringement, and damages for unfair competition in the further amount of $40,000.00 plus punitive damages against petitioner Lee of $25,000.00 and against petitioner Lee Cosmetics in the separate amount of $20,000.00 [C. T. p. 557].

2. Further Proceedings Before the Court for an Accounting of Profits, Injunctive Relief and Ancillary Remedies.

Following the verdict, petitioners substituted counsel [C. T. p. 561], and further proceedings were held on March 24, 25, 26 and 27, 1969, before the Court in respect to petitioners' net profits from copyright infringement and an injunction restraining petitioners' continued copyright infringement and acts of unfair competition. Other ancillary matters addressed to the Court in these proceedings included the impounding and destruction of copies of petitioners' infringing book and respondent's application for reasonable attorney's fees as part of respondent's costs [C. T. pp. 563, 564, 574, 575 and 576].

(a) Petitioners Stipulated to Net Profits From Copyright Infringement of $64,253.00.

Pursuant to Section 101(b) of the Copyright Act (Title 17, United States Code), respondent established gross sales of petitioners' infringing book, "The Joyce Lee Method of Scientific Facial Exercises", in the amount of $184,668.65, including 2,008 books that were not recorded as sales in the books and records of petitioner Lee Cosmetics [Reporter's Transcript,

hereinafter referred to as "R. T." Vol. 2,* .p. 594, line 10, to p. 595, line 24; p. 597, line 16, to p. 600, line 19; p. 604, line 7, to p. 605, line 10; p. 608, lines 9-15].

On March 24, 1969, petitioners' Certified Public Accountant Morton Shapiro testified that he had prepared a summary of book sales and costs from the books and records of Lee Cosmetics for the period of time from March 1, 1965 through February 28, 1969 [R. T. Vol. 2, p. 617, line 23, to p. 618, line 8; Deft. Ex. PB]; and that for such period petitioner Lee Cosmetics had a loss of $39,277.41 [R. T. Vol. 2, p. 625, lines 5-9].

Cross-examination of Mr. Shapiro revealed that the purported book expenses in his summary were not so recorded in the books and records of petitioner Lee Cosmetics [Pltf. Ex. 42] but were arbitrary allocations of various percentages of the total cosmetic, book and salon costs and expenses of Lee Cosmetics to the infringing book [R. T. Vol. 2, p. 631, lines 7-12].

Moreover, the general ledger and cash disbursement journals of petitioner Lee Cosmetics had been introduced into evidence on *February 12, 1969* [Pltf. Ex. 42]; and inquiry was therefore made of Shapiro as to how the period of his summary from them could extend to *February 28, 1969*. Shapiro then disclosed that he took these Exhibits from the Clerk's Office sometime in *March, 1969*, and added to them $68,429.04 in various categories of expense, arriving at a pencil bal-

*The proceedings before the Court on March 17, March 24, March 25, and March 26, 1969, are reported in Vols. 2 and 3 of the Reporter's Transcript *for those dates* and will be designated by volume number *i.e.*, Vol. 2 and Vol. 3.

ance of $95.14; and Shapiro used such items in preparing his summary showing a loss of $39,277.41 [R. T. Vol. 2, p. 638, line 14, to p. 639, line 5; p. 652, line 16, to p. 655, line 15; p. 657, line 1, to p. 685, line 8]. These items include disbursements to petitioner Lee of $22,261.00 in the form of loans and salary in the months of January and February 1969. [R. T. Vol. 2, p. 651, lines 2-18], payments to petitioners' trial attorney and to witnesses testifying in behalf of petitioners in this case [R. T. Vol. 2, p. 664, lines 5-23; p. 665, lines 4-8], and disbursements to petitioner Lee's companion Margaret Kaumlen (about whom more below) of $10,815.00 as repayment of a purported loan with interest, *on February 17, 1969* [R. T. Vol. 2, p. 652, lines 2-8]—the same day that the jury returned its verdict in this case against petitioners.

On March 26, 1969, two days after petitioners testified to losses of $39,277.41, petitioners stipulated in open Court that petitioner Lee Cosmetics had net profits from their infringing book in the amount of $64,253 [R. T. Vol. 3, p. 777, line 8, to p. 778, line 3; p. 787, lines 2-9; Deft. Ex. PD].

(b) Trial Court's Findings of Fact and Conclusions of Law in Respect to Petitioners' Infringing Profits; and Judgment.

The Trial Court's Finding of Fact that petitioner Lee Cosmetics had net infringing profits of $64,253 is based upon petitioners' stipulation to such effect and is computed in accordance with petitioners' Exhibit PD [C. T. p. 601, line 23, to p. 602, line 19]. The Trial Court's Conclusion of Law that respondent is entitled to damages of $80,000 for infringement of copyright, instead of infringing profits of $64,253, as

the higher of the two, is based upon this Court's decision in *Universal Pictures Co., Inc. v. Harold Lloyd*, (C.A. 9th 1947), [C. T. p. 603, lines 17-23]; and Judgment was entered accordingly [C. T. p. 606, line 23; p. 607, line 14 and lines 20-23].

The Judgment requiring petitioners to deliver 11,158 copies of petitioners' infringing book for impounding and destruction when the Judgment has become final, is in accordance with the provisions of Section 101(c)(d) of the Copyright Act (Title 17 U.S. Code). In the latter regard, petitioners' "Statement" that said copies of petitioners' book are "valued at over $250,000" (Pet. p. 11) is misleading and erroneous. The evidence at trial is that petitioners paid the printer a unit price of $1.78½ per completed copy of said book [R. T. Vol. 2 p. 599]; and petitioners' total production costs of said 11,158 infringing copies was in the amount of $19,917.03.

B. SUMMARY OF EVIDENCE SUPPORTING THE JUDGMENT.

1. Respondent's Origination, Development and Writing of "Face-Lifting by Exercise".

Respondent began work on her exercises for the face in Munich, Germany, in 1948 [R. T. p. 351, lines 3-7]. She delved into books on anatomy that described the muscle structure of the face, their location and points of action; and she read books on physical therapy, learning from them the benefit of slow-controlled, long-range movements of the muscles [R. T. p. 352, lines 4-12]. Respondent exchanged information and materials on beauty hints that she collected from magazines and newspapers of the day with a few actress friends who were also interested in the subject of the

face; and they experimented on each other's faces and practiced muscle movements of the face and neck before one another [R.T. p. 352, lines 12-25].

From such experimentation respondent came to the conclusion that muscles produced the utmost contraction in the longest range possible by applied resistance; and based upon this principle respondent developed procedures for holding one muscle ending against the nearest bone or between the fingers and through certain "grimaces" moving the muscle slowly toward the other end [R. T. p. 353, pp. 2-10; p. 429, line 2, to p. 431, line 6]. By 1954 respondent had originated and put into use a program of exercises for every muscle section of the face and neck [R. T. p. 354, lines 3-13; p. 433, lines 13-17; p. 433, line 18, to p. 434, line 23].

Respondent came to the United States in 1954, settling in Los Angeles [R. T. p. 354, lines 14-20]. In 1956, she began teaching her exercises to individuals here and in 1957 respondent opened a salon on Sunset Boulevard where she received clients for facial instruction [R. T. p. 355, line 6, to p. 356, line 12].

Respondent's first writing on this subject was in 1957 [R. T. p. 356, line 13, to p. 357, line 10; Pltf. Ex. 23]. In the same year she wrote an article entitled, "Self Face Rejuvenation" [R. T. p. 351, line 21, to p. 360, line 10; Pltf. Ex. 25]. Respondent's article was published in the February 15, 1959 issue of Vogue Magazine under the title "Face-Lifting By Exercise" [R. T. p. 365, line 20, to p. 366, line 2; Pltf. Ex. 28]. Thereafter respondent worked on the manuscript for her book [R. T. p. 358, lines 14-22; Pltf. Ex. 24]; and respondent's book "Face-Lifting By Exercise" was pub-

lished in April 1961 [R. T. p. 358, lines 12-13; Pltf. Ex. 2], and copyrighted by respondent as author and copyright proprietor [Pltf. Ex. 1].

2. Arrangements With Vogue Magazine; and New Matter in Respondent's Book.

Respondent submitted her manuscript [Pltf. Ex. 25] to Vogue Magazine in the latter part of 1958 [R. T. p. 360, lines 15-19]. In December 1958, respondent made a publication agreement with Vogue under the terms of which respondent gave Vogue the magazine publication rights only, with the copyright in respondent's manuscript to be reassigned to her as of January 1, 1960 for all further uses [R. T. p. 364, line 24, to p. 365, line 9; p. 616, line 23, to p. 617, line 9; Pltf. Exs. 26 and 27].

Respondent's 1961 book contains additional exercises, test and pictorial illustrations that were not published in Vogue, as well as exercises in the Vogue article [Pltf. Exs. 2 and 28; C. T. p. 212, line 19, to p. 5, line 19, summarizes the new matter in respondent's book].

3. Petitioner Lee Became Completely Familiar With the Exercises and Procedures in Respondent's Book During the Time She Worked for Respondent and Before Writing Petitioners' Infringing Book.

Before going to work for respondent in April 1962, petitioner Lee's sole activity from 1945 until 1961 was as an interior decorator and designer [R. T. p. 52, line 13, to p. 54, line 7]; and she was unemployed for the year before respondent hired her [R. T. p. 54, lines 8-11].

In March 1962, petitioner Lee saw respondent illustrating facial exercises through a model on respondent's

television program [R. T. p. 54, lines 16-25]. Lee came to plaintiff's salon on March 15, 1962, having made an appointment like any other client [R. T. p. 369, lines 4-9]. She requested instructions; respondent analyzed her face as to contour faults and gave her instructions for certain parts of her face, charging $7.50, respondent's normal fee for one-half hour of personal instruction [R. T. p. 369, line 22, to p. 370, line 5; p. 55, lines 9-13]. When the time was up, Lee told respondent that she was interested in this subject and said she would like to learn all of respondent's exercises and work for her [R. T. p. 370, lines 5-7]. Respondent was then presenting Face-Lifting By Exercise five-days-a-week on television, and she needed assistance at her salon [R. T. p. 370, lines 8-13]. Lee was hired in April 1962.

Respondent taught Lee exercises for her own face; she gave Lee a copy of her book Face-Lifting By Exercise and told Lee to study the book and watch respondent's television program; and respondent had Lee sit-in with her while presenting these exercises to clients in respondent's salon [R. T. p. 371, line 16, to p. 372, line 1; p. 59, lines 8-15].

Petitioner Lee worked for respondent until January 18, 1963 [R. T. p. 80, lines 15-17]. During that time Lee read the entirety of respondent's book [R. T. p. 64, lines 4-11] and she watched respondent demonstrate these exercises on television as often as she could [R. T. p. 64, line 12, to p. 66, line 5]. Lee instructed clients coming into respondent's salon in particular exercises they had seen on respondent's television program or read in respondent's book [R. T. p. 66, lines 6-19; p. 67, line 24, to p. 68, line 21; p. 80, lines 21-25]. Lee also assisted in selling cosmetic products respond-

ent used in connection with her exercises and the booklet Face-Lifting By Exercise [R. T. p. 81, lines 1-11], containing the same exercise as in respondent's book [R. T. p. 81, line 12, to p. 82, line 10; Pltf. Ex. 8].

Although a month or two after the termination of Lee's employment she formed petitioner Lee Cosmetics, in March or April 1963 [R. T. p. 82, lines 11-16; p. 85, lines 7-9], and she opened a salon in Los Angeles [R. T. p. 83, line 24, to p. 84, line 9] moving to Beverly Hills in 1964 [R. T. p. 87, line 24, to p. 88, line 1].

Sometime in 1964, petitioner Lee decided to put together a book [R. T. p. 85, lines 20-25]. When she was writing petitioners' book, Lee had a copy of respondent's work "Face-Lifting By Exercise" in her library together with one hundred or so handwritten pages on facial exercises [R. T. p. 96, line 21, to p. 98, line 5], which she had when she left respondent [R. T. p. 91, lines 17-25; p. 92, lines 9-14; p. 93, lines 2-5]; and Lee was familiar with each and all of respondent's exercises [R. T. p. 203, lines 2-12].

Petitioner Lee's only prior published writing was a piece on interior decorating for a Phoenix newspaper [R. T. p. 111, lines 7-11]; but Lee was able to write most of "The Joyce Lee Method of Scientific Facial Exercises" in one month, November or December, 1964 [R. T. p. 88, lines 17-19] and she had the completed manuscript ready for publication by July 1965 [R. T. p. 112, lines 5-22].

4. Petitioners' Copyright Infringement and Respondent's Damages Therefrom.

(a) Petitioners Appropriated Substantially All of the Exercises, Procedures and Illustrations in Face-Lifting by Exercise.

Petitioners' infringing book "The Joyce Lee Method of Scientific Facial Exercises" reproduces substantially all of the exercises and procedures for the face in respondent's book. Appendix 3 attached hereto is a summary of the exercises that petitioners took from respondent's book, listed by name and number only. A comparison of the text of respondent's exercises with the corresponding exercises in petitioners' infringing book, including references to photographic illustrations of the same in each book, is set forth in Exhibit PS of the Record.

(b) Petitioners Destroyed the Value of the Reissue and Republication Rights in Respondent's Copyright.

From January through July 1965, respondent wrote the manuscript of a sequel to Face-Lifting By Exercise entitled "Ageless Beauty Through Modern Science" [Pltf. Ex. 32]. It covers 189 pages and contains the same exercises in respondent's book Face-Lifting By Exercise [R. T. p. 408, lines 12-17] adapted to an implement devised by respondent called "Face-Ex" [R. T. p. 408, lines 18-22; Pltf. Ex. 31].

Respondent submitted the manuscript of her sequel work to Prentiss Hall late in 1965 [R. T. p. 409, lines 12-19]. Unbeknown to respondent, petitioner Lee had sent letters to numerous book publishers including Pren-

tiss Hall, soliciting publication of "The Joyce Lee Method of Scientific Facial Exercises", stating in such letters: "*Over a period of years I have created, developed and put into use a scientific method of preventative and corrective facial exercises,*" and enclosing with such letters an illustrative exercise for the face copied from respondent [R. T. p. 113, lines 6-21; p. 115, lines 18-22; p. 116, lines 13-17; p. 117, lines 4-7; p. 118, lines 9-14; Pltf. Exs. 4, 5 and 6]. Petitioner Lee was conducting such negotiations with Prentiss Hall [R. T. p. 903, line 12, to p. 908, line 20; Pltf. Ex. 45 for *Id.*] at the time respondent approached the same publisher with "Ageless Beauty Through Modern Science". Respondent's work was rejected but Prentiss Hall offered petitioner Lee a book publication contract.

A book publisher to whom petitioner Lee had not so written was Sherbourne Press in Los Angeles. Respondent submitted her sequel work to this publisher early in 1966 and it was received with enthusiasm [R. T. p. 409, lines 19-22; Pltf. Ex. 33]. Respondent met with Sherbourne's chief editor, Earl Swick, and was introduced to Mrs. Sands, the editor assigned to respondent's manuscript; and the book was scheduled for publication in Sherbourne's Spring Catalog [R. T. p. 410, lines 24-25; p. 411, lines 4-23]. Having made these arrangements, respondent announced "Ageless Beauty Through Modern Science" on her Face-Ex Instruction Booklet [R. T. p. 416, line 22, to p. 417, line 9; Pltf. Ex. 31].

But on March 28, 1966 Sherbourne notified respondent that her work would not be published [R. T. p. 413, lines 13-25; Pltf. Ex. 33]. Respondent immediately called Mrs. Sands and was informed that the same

exercises had been published in petitioner's book which was then being advertised on television [R. T. p. 415, line 11, to p. 416, line 3] and "no publisher wants to be second on the market" [R. T. p. 416, lines 9-11].

At the time respondent filed this lawsuit, she could not even get an article on her exercises published in "Let's Live", a national health magazine, because petitioners were then advertising the infringing book in such publication and its editor, like Sherbourne Press, decided "it wouldn't be wise to have two people with the same thing at the same time" [R. T. p: 673, lines 4-24; Pltf. Ex. 44].

Respondent's time in preparing the sequel work "Ageless Beauty Through Modern Science" was valued at $20,000.00, computed at $15.00 per hour [R. T. p. 407, lines 16-18; p. 418, line 25, to p. 419, line 7]. The value of publication rights for reissuance or continuation of respondent's exercises for the face was $100,000 or more. [R. T. p. 418, lines 17-24]. Such valuation is based upon respondent's opinion as copyright owner of these rights and as an expert in the field; and it is supported by respondent's prior use of republication rights in respondent's booklet "Face-Lifting By Exercise" with the sale of 10,000 copies and proceeds of $20,000 [R. T. p. 418, lines 9-14], and by $25,000 in commercial time that respondent got for television performances of the exercises in her book [R. T. p. 419, lines 8-21], and by the residual commercial value of respondent's exercises in the sale of cosmetic products [R. T. p. 599, lines 5-8]. In the latter regard, respondent through Runge Cosmetics, Inc. used these facial exercises as a vehicle for selling various cosmetic products used in connection with the exer-

cises [R. T. p. 918, lines 13-15; Pltf. Exs. 31, 34, 35, 36, 37, 38]. Gross sales from this activity were in excess of $150,000, from which plaintiff realized net income of $19,585 [R. T. p. 922, line 1, to p. 923, line 2].

Petitioners irreparably damaged the value of respondent's copyright by falsely exaggerating the results that could be achieved in rejuvenation of the face by use of the exercises in petitioners' infringing book [R. T. p. 139, line 24, to p. 140, line 2; p. 140, lines 8-10].

More particularly, on the outside back cover of petitioners' book and again on pages X and XI, immediately preceding the table of contents, there are two photographs of Margaret Kaumlen together with the false and fraudulent representation, "These photographs of Margaret Kaumlen at the age of 55 years taken at an interval of five months. This transformation was the result of using the Joyce Lee method of scientific facial exercises" [Pltf. Ex. 3].

These so-called "before" and "after" pictures of Margaret Kaumlen and the same false representations about them are featured in the pre-publication literature that petitioners sent to respondent's salon customers [Pltf. Ex. 9]. Petitioners published the same photographs and made the same false claims in display advertising in newspapers and magazines [Pltf. Exs. 12, 13, 15 and 16]. Petitioner Lee personally supplied newspapers with prints of the "before" and "after" Kaumlen pictures [R. T. p. 163, lines 17-25] and the same were published in stories about petitioner Lee's method and petitioners' book [Pltf. Ex. 16].

Petitioners furthermore reproduced the same "before" and "after" photographs in the second edition of

petitioners' book colorably changing the still fraudulent representation, to read: "Here on the right is the same Margaret Kaumlen at the age of 52, the startling transformation was the result after five months of faithfully following the Joyce Lee method" [Pltf. Ex. 20].

As a matter of fact: the "before" picture of Miss Kaumlen is a blow-up of an unretouched passport photo taken some five years before the "after" picture [R. T. p. 140, lines 13-16]; the "after" picture was taken by a professional photographer engaged for such purpose [R. T. p. 144, line 21, to p. 145, line 3]; the "startling transformation" shown in the "after" picture is the result of retouching the negative by removal of lines from under Miss Kamulen's eyes, smoothing up her neck, and retouching around the side under her eyes and on her cheek [R. T. p. 147, lines 5-22]; this transformation was also given an assist by cosmetic surgery that Miss Kaumlen had performed upon her face in the time between the two pictures [R. T. p. 326, line 22, to p. 327, line 6]; Miss Kaumlen explained the disappearance of the distending hairline shown in her "before" picture, and her straight hairline in the "after" picture, by the wig she wore for the "after" picture [R.T. p. 327, line 24, to p. 328, line 24].

These fraudulent claims disparaged the quality of respondent's copyrighted work by making the exercises and procedures in "Face-Lifting By Exercise" appear to be inferior to those in "The Joyce Lee Method of Scientific Facial Exercises" [R. T. p. 393, lines 2-17; p. 393, lines 9-15]. The publication and the manner of exploitation of petitioners' infringing book completely appropriated and consumed the market for the repub-

lication of respondent's exercises, rendering respondent's reissue rights and sequel work and efforts in creating the same valueless.

III.
Questions Presented.

The Petition (pp. 4-6) presents eight questions upon which a review is requested, should this Writ be granted. It is submitted that the questions framed by petitioners are not only duplicative and overlapping but are also at variance with the material facts in this case. Accordingly, respondent has rephrased these questions which are sought to be raised by petitioners, as follows;

(1) Do the instructional materials in respondent's book, "Face Lifting By Exercise", constitute copyrightable subject matter under the Copyright Act, Title 17 of the United States Code, and Article I, Section 8, Clause 8, of the United States Constitution?

(2) Did respondent satisfy the statutory formalities of notice required by the Copyright Act in securing copyright in her said book?

(3) Where an author grants a publisher the right of magazine publication only, it being agreed that the copyright in such material is to revert to the author for all other uses, and the author thereafter includes such material in a book published with substantial new matter, taking copyright therein in the name of the author, does the author have to join the magazine publisher in an action against third parties for copyright infringement of such book?

(4) Did petitioners infringe upon respondent's said copyright?

(5) Is there sufficient evidence of damage to respondent as a result of petitioners' copyright infringement?

IV.

Argument Countering Asserted Reasons for the Writ.

A. RESPONDENT'S WORK SATISFIES THE COPYRIGHT STANDARD OF "ORIGINALITY" BOTH UNDER THE COPYRIGHT ACT AND THE CONSTITUTIONAL CLAUSE; AND PETITIONERS' ATTEMPT TO CONDITION COPYRIGHT PROTECTIBILITY BY THE PATENT STATUTE'S STRINGENT REQUIREMENTS OF "NOVELTY" AND "INVENTION" IS CONTRARY TO PREVAILING LAW AND PUBLIC POLICY.

The Congressional mandate for uniform and national legislation as to Copyrights and Patents both derive from Article I, Section 8, Clause 8 of the United States Constitution. But the very language of the Constitution differentiates (a) "authors" and their "writings" from (b) "inventors" and their "discoveries." From inception in 1790, legislation governing the issuance of patents for inventions and discoveries has required that there be inventive genius going "a step beyond the prior art" by subjecting patent claims to an invention or discovery to an anticipation search and examination in the Patent Office before any exclusive right could be obtained from the government. Contrarywise as to copyrights, where from inception in 1790 to present, the uniform standard for authors to secure copyright in their writings has been expressed in terms of "independent conception" or "originality", without requiring any degree of novelty or uniqueness whatever.

Thus, the word "author" in the Constitutional Clause has been largely defined as "he to whom anything

owes its origin; originator; maker; one who completes a work of science or literature" (*Burrow-Giles Lithographic Co. v. Sarony,* 111 U.S. 53 (1884)); and, so too: "By writings in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given visible expression (*Burrow-Giles Lithographic Co. v. Sarony,* 111 U.S. 53 (1884), as per Mr. Justice Miller). The same broad sweep of interpretation of the Constitutional Clause as applied to Copyrights and the policy justification therefor was expressed by Mr. Justice Holmes in *Bleistein v. Donaldson Lithographic Co.,* 188 U.S. 239 (1903), holding that chromolithographs for advertisements of a circus were copyrightable "pictorial illustrations" under the Act of 1874, as follows:

> "The Constitution does not limit the useful to that which satisfies immediate bodily needs. Burrow-Giles Lithographing Co. v. Sarony, 111 U.S. 53, 28 L.Ed. 349, 4 S.Ct. 279. It is obvious also that the plaintiff's case is not affected by the fact, if it be one, that the pictures represent actual groups, —visible things. They seem from the testimony to have been composed from hints or description, not from sight of a performance. But even if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. Blunt v. Patten, 2 Paine, 397, 400 Fed.Cas.No.1,580. See Kelly v. Morris, L.R.

1 Eq. 697; Morris v, Wright, L.R. 5 Ch. 279. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act."

* * *

"It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to pictures which appealed to the public less educated than the Judge. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an aesthetic and educational value,—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights. See Henderson v. Thomp-

kins, 60 F. 758, 765. We are of opinion that there was evidence that the plaintiffs have rights entitled to the protection of the law.

The prevailing law in this regard was summed up by the late Judge Jerome Frank, speaking for the Second Circuit in *Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc.*, 191 F.2d 99 (C.A. 2d 1951):

> "It is clear, then, that nothing in the Constitution commands that copyrighted matter be strikingly unique or novel. Accordingly, we were not ignoring the Constitution when we stated that a 'copy of something in the public domain' will support a copyright if it is a 'distinguishable variation'; or when we rejected the contention that 'like a patent, a copyrighted work must be not only original, but new', adding, 'That is not . . . the law as is obvious in the case of maps or compendia, where later works will necessarily be anticipated.' All that is needed to satisfy both the Constitution and the statute is that the 'author' contributed something more than a 'merely trivial' variation, something recognizably 'his own.' Originality in this context 'means little more than a prohibition of actual copying.' No matter how poor artisitically the 'author's' addition, it is enough if it be his own. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250, 23 S.Ct. 298, 47 L.Ed. 460.
>
> "On that account, we have often distinguished between the limited protection accorded a copyright owner and the extensive protection granted a patent owner. So we have held that 'independent reproduction of a copyrighted . . . work is not infringement', whereas it is *vis a vis* a patent.

> Correlative with the greater immunity of a patentee is the doctrine of anticipation which does not apply to copyrights: The alleged inventor is chargeable with full knowledge of all the prior art, although in fact he may be utterly ignorant of it. The 'author' is entitled to a copyright if he independently contrived a work completely identical with what went before; similarly, although he obtains a valid copyright, he has no right to prevent another from publishing a work identical with his, if not copied from his. A patentee, unlike a copyrightee, must not merely produce something 'original'; he must also be 'the first inventor or discoverer.' 'hence it is possible to have a plurality of valid copyrights directed to closely identical or even identical works. Moreover, none of them, if independently arrived at without copying, will constitute an infringement of the copyright of the others.' "

This Court in *Mazer v. Stein*, 347 U.S. 201 (1954) rejected essentially the same argument that Petitioners make here, holding that the patentability of a work does not effect its copyrightability under the Copyright Act. Mr. Justice Reed, speaking for the Court, stated the following:

> "Petitioner urges that overlapping of patent and copyright legislation so as to give an author or inventor a choice between patents and copyrights should not be permitted. We assume petitioner takes the position that protection for a statuette for industrial use can only be obtained by patent, if any protection can be given."
>
> "As we have held the statuettes here involved copyrightable, we need not decide the question of

their patentability. Though other courts have passed upon the issue as to whether allowance by the election of the author or patentee of one bars a grant of the other, we do not. We do hold that the patentability of the statuettes, fitted as lamps or unfitted, does not bar copyright as works of art. Neither the Copyright Statute nor any other says that because a thing is patentable it may not be copyrighted. We should not so hold."

* * *

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talent of authors and inventors in 'Science and use Arts.' Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

Petitioners' argument that the instructional materials in the respondent's book should be characterized as a patentable process within the scope of Section 101 of Title 35 of the United States Code and inasmuch as Respondent did not attempt to secure a patent on such materials "they went into the public domain" (Pet. p. 34) is totally at variance with the development of the law in this area, as discussion above. Furthermore, petitioners' reference to *Baker v. Selden,* 101 U.S. 99 (1879) (Pet. pp. 34-35) as support for the notion that respondent's failure to seek patent protection for the instructional materials in her book precludes copyright protection for the same, is contrary to this Court's decision in *Mazer v. Stein,* 347 U.S. 201 (1952).

Similarly, the several patent cases which petitioners cite including a quotation from *Graham v. John Deere,* 383 U.S. 1 (1966) (Pet. pp. 24-32) all have reference to the patent contexts in which they arose and cannot properly or reasonably be construed as authority for any Constitutional requirement of novelty as a condition of securing copyright under the federal copyright laws. Professor Nimmer, commenting on this Court's decision in *Graham v. John Deere Co., supra,* and, indeed, the very language from that case in the Petition here, states:

> "It is, however, most unlikely that any court would accept this argument as applied to copyright since the result would be to invalidate the copyright in a substantial portion of all literary works, where novelty as distinguished from originality is a very rare commodity." (*Nimmer on Copyright,* Page 33, §10.1, "Originality Distinguished from Novelty.").

It is submitted that the Court of Appeals for the Ninth Circuit in affirming the judgment of the District Court in its entirety, properly held that:

> "The standard of 'novelty' urged by appellants is applicable to patents, but not copyrights. The copyright standard is one of 'originality':
>
> 'The requirements for the "originality" necessary to support a copyright are modest. The author must have created the work by his own skill, labor and judgment, contributing something "recognizably his own" to prior treatments of the same subject. However, neither great novelty nor superior artistic quality is required.'
>
> *Doran v. Sunset House Dist. Corp.,* (S.D. Cal. 1961) 197 F. Supp. 941, 944, aff'd (9 Cir. 1962)

394 F.2d 251. There was sufficient evidence before the jury to support a finding that Runge's book satisfied the originality requirement." (169 U.S.P.Q. 390.)

B. RESPONDENT'S COPYRIGHT IS VALID AND WAS INFRINGED.

1. The Instructional Materials in Respondent's Book "Face-Lifting By Exercise" Constitutes Copyrightable Subject Matter.

There are many cases upholding the validity of copyright in instructional materials and courses of instruction. In *Neal v. Thomas Organ Co.,* 325 F. 2d 978 (C.A. 9th 1964), the copyright in a manual of instructions on how to play an electronic chord organ was held to be valid and infringed. In *National Institute, Inc., etc. v. Nutt,* 28 F. 2d 132 (D. Conn. 1928), aff'd 31 F. 2d 236 (C.C.A. 2d 1929), copyright was upheld in a course of lectures for memory improvement, In *Emerson v. Davies,* 8 Fed. Cas. 615 (CC. Mass. 1845), Judge Story sustained the copyright in a set of arithmetic lessons combining numbers in common use with a lesson plan. In *Powell v. Stransky,* 98 F. Supp. 434 (D.C. Dak. 1951), copyright was sustained in a course of instructions on how to run a mail order business. In *College Entrance Book Co. v. Amsco Book Co., Inc.,* 119 F. 2d 874 (C.A. 2d 1941), lists of common French words and phrases arranged with English translations were held to be copyrightable. In *Nikinov v. Simon & Schuster, Inc.,* 114 F. Supp. 375 (S.D.N.Y. 1956), aff'd 246 F. 2d 501 (C.A. 2d 1957), copyright was found to exist in a Russian-language chart consisting of a single sheet, described by the Court as follows:

"The plaintiff's copyrighted chart incorporated a method he had devised to teach the Russian alphabet to English-speaking students. This method consisted of dividing the letters of the Russian alphabet into three groups: those letters which both look and sound like Latin letters; those which look like Latin letters but are pronounced differently; and those, mostly derived from the Greek, which neither look nor sound like Latin letters. Pronunciation was illustrated by the use of key note words which mean and sound the same in both Russian and English.".

The foregoing cases are in line with common law doctrine going back to Blackstone, recognizing protectible literary property in lecture notes and instructional materials. This breach of the law is summarized by Judge Yankwich in *White v. Kimmell,* 94 F. Supp. 502 (S.D. Cal. 1950), rev'd on other grounds 193 F. 2d 744 (C.A. 9th, 1952):

"From the very beginning of the development of this branch of the law, it has been conceded that circulation among students does not destroy the common-law right of the author. In one of the old cases [*Abernethy v. Hutchinson,* 3 L.J. Ch. Reports, 209 (1824)] the Lord Chancellor made the following observations: 'Now, if a professor be appointed, he is appointed for the purpose of giving information to all the students who attend him, and it is his duty to do that; but I have never yet heard that anybody could publish his lectures; nor can I conceive on what ground Sir William Blackstone had the copyright in his lectures for twenty years, if there had been such a right as that: but it never was understood that

> those lectures could be published;—and so with respect to any other lectures in the university it was the duty of certain persons to give those lectures; but it never was understood that the lectures were capable of being published by any of the persons who heard them.' And all those who have followed Blackstone and combined teaching with writing, whether in the field of law or others, have had the benefit of the rule." (94 F. Supp. at pp. 508-509).

Respondent does not claim copyright in the idea of exercising facial muscles or in the principle of resistance that underlies her work [R. T. p. 434, lines 2-5]. Respondent's copyright in "Face-Lifting By Exercise", covers the particular exercise for the face originated by respondent and expressed in the form of instructions and procedures and pictorial illustrations to show the student how to perform the same on his own face.

Respondent independently created and wrote this program of exercises for the face through study and experimentation and by her own skill and judgment. This may be exemplified by the following testimony of plaintiff at trial:

> ". . . there are actually four muscle *bands* that constitute the upper cheek. I have found a way to resist each particular muscle individually. Through my diagram and the book . . . I explain to people where to see the muscle running into the laugh line or the smile line and to hold exactly at this point. And I have numbered these muscles. The anatomy has not numbered these muscles. I have numbered these muscles 1, 2, 3, 4. As to muscle 4, when it has relaxed, but muscle 3 not,

then apply resistance at the point where No. 4 muscle runs into the smile line" [R. T. p. 430, line 20, to p. 431, line 6].

Respondent's work clearly satisfies the copyright standard of originality to give it protectible status, as found at trial and, we submit, properly affirmed by the Court of Appeals for the Ninth Circuit (169 USPQ 388 at p. 390).

2. Respondent Has a Proper Copyright Notice in Her Book; and She Was Not Required to Mention the Prior Publication of Part of Her Material in Vogue Magazine in Such Notice.

Where an article is first published as a contribution to a periodical and the author subsequently republishes that article in a book containing new matter, it is not necessary to use the year date of the prior publication in the notice of copyright in the book nor is it necessary to mention such prior publication in the book notice of copyright.

In *Wrench v. Universal Pictures Co., Inc.,* 104 F. Supp. 374 (S.D.N.Y. 1952), plaintiff had published short articles on her experiences as a teacher in Atlantic and The New Yorker magazines and she subsequently published a book including four previously unpublished pieces, as well as revisions of the published stories under a single book copyright notice in plaintiff's name with the year-date of book publication only. The Court held that there was sufficient copyrightable new matter in plaintiff's book and that the only notice necessary under Section 7 of the Act was the notice in respect to the book, stating:

"The publication of a new work with its own copyright notice dispenses with the necessity of listing

> any prior copyright in order to protect it. This is provided for by the wording of the statute (Section 7) that such publication 'shall not affect the force and validity of any subsisting copyright upon the matter employed or any part thereof'.".

The Court further held that recordation prior to substitution of the name of the copyright proprietor under Section 32 of the Copyright Act is inapplicable to republication of a book with material that did not appear in prior editions, limiting *Group Publishers, Inc. v. Winchell*, 86 F.Supp. 573 (S.D.N.Y. 1949), relied on by petitioners here (Pet., p. 38) to republication of the same material without change or any new matter added to it.

Respondent's book "Face-Lifting By Exercise" published in April 1961 contains substantial new matter both as to facial exercises, text and photographic illustrations, that was not in her 1959 article in Vogue magazine. It is submitted that the notice of copyright in respondent's book complies in all respect with the formalities required by the Copyright Act.

> *Wrench v. Universal Pictures Co., Inc.*, 104 F. Supp. 374 (S.D.N.Y. 1952).

Petitioners furthermore erroneously assert that respondent's failure to fill out the "new matter" part of respondent's Application of a Claim to Copyright in her book-[Pltf. Ex. 1] constituted unclean hands which preclude respondent from enforcing such copyright against petitioners in this case (Pet. p. 5, pp. 38-39). The same argument was made and in *Wrench v. Universal Pictures Co., Inc., supra*, and rejected by the Court as follows:

> "Universal also urges that assuming the 1948 notice to be sufficient, the copyright of the book is

> defective because in plaintiff's application for her United States copyright she failed to state that the book was a new edition. But irregularities in the copyright application standing alone do not effect the validity of the copyright, where, as here, there has been compliance with the statute. *United States v. Backer*, 2 Cir., 1943, 134 F. 2nd 533; *Baron v. Leo Feist, Inc.*, D.C., 78 F. Supp. 686, 692, affirmed 2 Cir., 1949, 173 F. 2d 288. There is no claim by Universal that either it or anyone else was misled by this omission in the application; there is no evidence to indicate a purpose to deceive; the omission was innocuous."

Petitioners' reliance on *International Boitical v. Associated Mills*, 239 F. Supp. 511 (N.D. Ill. 1964), (Pet. p. 39) is factually inapposite to the case at bar. The plaintiff there had deliberately misrepresented prior art in affidavits filed with the Court in the design patent phase of that matter and the Court further found that the copyright in plaintiff's trade catalog had not been infringed.

In the case at bar petitioners were not in any way misled by respondent's copyright application nor is there any evidence here that respondent intended to mislead or deceive anyone by the same

3. Respondent's Article in Vogue Magazine Is Not in the Public Domain.

Petitioners' contention that respondent's article in Vogue magazine went into the public domain because it was not copyrighted in respondent's name (Pet. pp. 37-38) is completely erroneous.

Under Section 9 of the Copyright Act, a copyright may vest initially in the "author *or proprietor* of any

work". Typically, where an article is first published in a periodical, copyright is secured in the name of the publisher.

Goodis v. United Artists Television, Inc. (C. A. 2d 1970), 425 F. 2d 397 (C.A. 2d 1970), reversing 278 Supp. 122 (S.D.N.Y. 1968);

Harold Lloyd Corp. v. Witwer, 46 F. 2d 792 (S.D. Cal. 1930);

Wrench v. Universal Pictures Company, Inc., 104 F. Supp. 374 (S.D.N.Y. 1952).

Under respondent's agreement with Vogue, the latter acquired magazine publication rights only and the copyright in respondent's material was to revert to her for all furher uses as of January 1, 1960. This agreement gave Vogue a sufficient quantum of interest to support copyright in respondent's article as a copyrightable component part of the copyright of the entire edition of the magazine secured by Vogue [Pltf. Ex. 28; Deft. Ex. AC]. The residuum of rights in respondent's article belonged to respondent as the beneficial owner of such copyright, subject only to the restriction on her exercise of such rights prior to January 1, 1960.

In *Harold Lloyd v. Witwer*, 36 F. 2d 792 (S.D. Cal. 1930), plaintiff's story, "The Emancipation of Rodney", was initially published in Popular Magazine under an agreement between plaintiff and the publisher reserving all rights in the work other than magazine publication, to the plaintiff. The Court held that the plaintiff, as equitable owner of such copyright, could maintain a suit for infringement without joining the publisher as follows:

"The character of H. C. Witwer as owner of the equitable title to the copyright is not disputed

> so far as the evidence in the case shows, and I am inclined to sustain the position taken by plaintiff in this respect. In a suit by the owner of only an equitable title, the owner of the legal title should, perhaps, be joined as a party, but this does not seem to be held absolutely necessary. Street & Smith, Inc., appear to be only a nominal party, and the plaintiff is the real party in interest, and should be deemed able to recover such damages. 21 C. J. 304; 25 Cal. Jur. 354."

In *Goodis v. United Artists Television, Inc.* (C.A. 2d 1970), 425 F. 2d 397 (C.A. 2d 1970), reversing 278 F. Supp. 122 (S.D.N.Y. 1968), the author of the novel Dark Passage entered into an arrangement with Curtis Publishing Company for serialization in the Saturday Evening Post prior to book publication. Dark Passage was published in eight installments of the Post, each issue containing a single copyright notice in the magazine's name. The book was thereafter published by the author who brought an action for copyright infringement of dramatic transformation rights by the production and broadcasting of the television series entitled "The Fugitive." The District Court granted defendant's motion for summary judgment on the ground that a magazine publisher who acquired only the right to serialize a work before its publication in book form was merely a licensee of the author and did not have a sufficient interest in the work to secure copyright in its own name.

In reversing, the Court of Appeals held that the magazine publisher under these circumstances did have a sufficient quantum of interest in magazine serialization rights that would support a valid copyright in its

name for or on behalf of the author as the beneficial owner of such copyright for all other rights therein. including the right to enforce such copyright without the necessity of joining the publisher as a party to such action:

> "We unanimously conclude that where a magazine has purchased the right of first publication under circumstances which show that the author has no intention to donate his work to the public, copyright notice in the magazine's name is sufficient to obtain a valid copyright on behalf of the beneficial owner, the author or proprietor.
>
> "In the district court, defendants argued that the single copyright notice in the magazine's name was not sufficient to preserve Goodis' rights in 'Dark Passage'; thus, the novel, not being protected upon first publication, was thrown into the public domain as it appeared, installment by installment, in the 'Saturday Evening Post'. While it is clear that a periodical under some circumstances may obtain copyright for itself on the contents of an issue by a single copyright notice containing its own name, 17 U.S.C. §3; Kaplan v. Fox Film Corp., 19 F. Supp. 780, 33 USPQ 469 (S.D. N.Y. 1937), defendants urged that Curtis could only obtain copyright on behalf of the beneficial owner for those instalments of which it is a 'proprietor' or 'assignee,' rather than a mere 'licensee.' 17 U.S.C. §§3, 9; Morse v. Fields, 127 F. Supp. 63, 104 USPQ 54 (S.D. N.Y. 1954). Relying on Morse v. Fields and cases with similar language, the district court concluded as a matter of law that Curtis could not have been an assignee because it had been

granted only a license for a one-time serialization of the novel.

"Such a determination rests on the doctrine of 'indivisibility of copyright,' which rejects partial assignments of copyrights and requires a proprietor or assignee of a copyright to hold nothing less than all the rights in a copyrighted work. It is true that Curtis did not own all the rights in 'Dark Passage' at the time it was first published; in fact, at that time Goodis and Warner Brothers had already contracted for the exclusive motion picture rights.

"We are convinced, however, that the doctrine of indivisibility of copyright is a judge-made rule which related primarily to the requisite interest needed to bring an infringement action. See generally, H. Warner, Radio and Television Rights § 53 (1953). The most frequently cited policy for applying the indivisibility rule is to avoid multiple infringement actions, each brought by the holder of a particular right in a literary work without joining as a co-plaintiff the author or proprietor of the copyrighted work. New Fiction Pub. Co. v. Star Co., 220 F. 994 (S.D. N.Y. 1915.) Even after the Copyright Act underwent substantial revision and liberalization in 1909, the courts in this circuit indicated support for the doctrine. See Goldwyn Pictures Corp. v. Howell Sales Co., 282 F. 9 (2d Cir. 1922); New Fiction Pub. Co. v. Star Co., supra; but cf. Photo-Drama Motion Picture Co., Inc. v. Social Uplift Film Corp., 213 F. 374 (S.D. N.Y. 1914), aff'd, 220 F. 448 (2d Cir. 1915). The doctrine was seriously questioned in subsequent years, Houghton Mifflin

Co. v. Stackpole Sons, Inc., 104 F. 2d 306, 311-2, 42 USPQ 96, 100-101 (2d Cir. 1939), but has not been overruled. . . ."

"We are loath to bring about the unnecessarily harsh result of thrusting the author's product into the public domain when, as here, everyone interested in 'Dark Passage' could see Curtis' copyright notice and could not have believed there was any intention by Goodis to surrender the fruits of his labor."

It is submitted that respondent did not forfeit any rights in "Face-Lifting By Exercise" by publication of her article in Vogue magazine in 1959; that respondent's article did not go into the public domain: and that respondent's book copyright is not invalid in any part.

4. Petitioners' Infringement Was Not De Minimus nor Did It Constitute a Fair Use of Plaintiff's Work.

It is well established that infringement is not confined to literal reproduction of any copyrighted work. As stated in *Universal Pictures Co., Inc. v. Harold Lloyd Corporation,* 162 F. 2d 354 (C.C.A. 9th 1948):

"An infringement is not confined to literal and exact repetition or reproduction; it includes also the various modes in which the matter of any work may be adopted, imitated, transferred, or reproduced, with more or less colorable alterations to disguise the piracy. Paraphrasing is copying and an infringement, if carried to a sufficient extent. Complete or substantial identity between the original and the copy is not required. Copying

> and infringement may exist, although the work of the pirate is so cleverly done that no identity of language can be found in the two works."

In *Nutt v. National Institute, Inc. for the Improvement of Memory*, 31 F. 2d 326 (C.C.A. 2d 1929) copyright infringement of lecture materials was held as follows:

> "A comparison of the appellant's lectures with the copyrighted lectures shows similarity and copying of the association, presentation, and combination of the ideas and thoughts which go to make up the appellee's literary composition. Such appropriation and use of them is an unlawful infringement."

In *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921 (S.D. Cal. 1963) paraphrasing of portions of a factually true biographical work was held to be an infringement of copyright therein, the Court stating:

> "The association, arrangements and combination of ideas and thoughts and their form of expression may entitle a particular literary composition to protection".

Accord: *Nikinov v. Simon & Schuster Inc.*, 114 F. Supp. 375 (S.D.N.Y. 1956), aff'd 246 F. 2d 501 (C.A. 2d 1957).

One of the issues at the trial of this cause was whether the alleged infringing book was the result of petitioner Lee's independent efforts or whether it was copied from and based upon respondent's work. As the Court of Appeals for the Ninth Circuit observes in its decision, the District Court properly instructed

the jury on this issue, based in the main on petitioners' requested instructions (169 USPQ 388 at page 390); and the Ninth Circuit, we submit properly sustained the verdict of the jury and its implied finding that petitioners' infringing book is not an independent treatment of the same subject but an unlawful appropriation of respondent's copyrighted work and labors (169 USPQ at p. 391).

C. THERE IS SUBSTANTIAL EVIDENCE OF DAMAGE TO RESPONDENT RESULTING FROM PETITIONERS' INFRINGEMENT OF COPYRIGHT.

Under Sections 1(a) and (b) of the Copyright Act the copyright proprietor has the exclusive right to reprint and sell the copyrighted work and "any other version thereof".

As applied to this case, respondent owned the exclusive right under copyright to reissue and republish her facial exercises in her sequel to "Face-Lifting By Exercise" entitled "Ageless Beauty Through Modern Science"; that petitioners' publication and manner of exploitation of "The Joyce Lee Method of Scientific Facial Exercises" misappropriated these rights and the market for the same and prevented respondent's publication of her sequel, thereby destroying the value of these rights and respondent's investment of time in connection therewith.

The value of these rights was properly established by respondent's opinion testimony, as their owner and as an expert, and by the prior sales history of respondent's exercises in respondent's book and booklet "Face-Lifting By Exercise", and the proven commercial value of respondent's exercises in the fields of television and in connection with the sale of cosmetic products.

In *Universal Pictures Co., Inc. v. Harold Lloyd Corp.*, 162 F. 2d 354, (C.C.A. 9th, 1947), plaintiff was awarded damages of $40,000 for injury to the reissue rights in plaintiff's 1931 motion picture "Movie Crazy" by defendant's misappropriation of approximately 20% of plaintiff's work in defendant's motion picture "So's Your Uncle' released in 1943. The evidence in support of such damages consisted of the testimony of Harold Lloyd as an officer of plaintiff, the copyright proprietor of plaintiff's motion picture, expert testimony on the value of these reissue rights and the costs and sales of the subject picture 10 years prior to the infringement. The Court held that the value of the reissue right of plaintiff's picture could properly be established through the testimony of the owner of such property.

> "The appellants object to the use of the plaintiff's own testimony as to the value of the misappropriated property. The owner of personal property may always testify to its value. He may testify to the value of intangibles as well as the value of an advertising scheme, *Brookins v. National Refining Co.*, 26 Ohio App. 546, 160 N.E. 97; also he may testify to the value of the good will of a business, *White, Corbin & Co. v. Jones*, 79 App. Div. 373, 79 N.Y.S. 583. Literary property is not distinguished from other personal property and is subject to the same rules and is likewise protected, *Palmer v. DeWitt*, 47 N.Y. 532, 538, 7 Am. Rep. 480. California has held that plaintiffs may testify to the value of an unpublished manuscript prior to misappropriation in *Barsha v. Metro-Goldwyn-Mayer*, 32 Cal. App. 2d 556, 90 P. 2d 371. See *Yadkoe v. Fields*, 66 Cal. App. 2d 150, 151 P. 2d 906; *Nathan v. King Features Syndicate*, Supp., 32 N.Y.S. 2d 519."

In rejecting petitioners' attack upon the adequacy of the evidence supporting the jury's determination of damages from infringement as being without merit, the Ninth Circuit held as follows, at 169 USPQ 388, 391:

> "The record discloses evidence that appellants' infringement severely damaged the value of the reissue and republication rights of Runge's original book and her sequel. It is expressly provided in 17 U.S.C. § 1, that a person upon complying with the provisions contained in Title 17, shall have the exclusive right "(a) * * * to reprint * * * the copyrighted work", and "(b) * * * make any other version thereof * * *".
>
> Runge testified that the value of her labor in writing the sequel was $20,000.00 (computed at $15 an hour), and that the value of publication rights for reissuance or continuation of her exercises was at least $100,000.00 (based on past experience). Credible testimony by the owner of literary property regarding its value can provide an adequate evidentiary basis for an award of damages. Universal Pictures Co., Inc. v. Harold Lloyd Corp., (9 Cir. 1947) 162 F.2d 354, 73 USPQ 317. The trial judge determined, pursuant to appellants' stipulation, that infringing profits amounted to $64,253.00 but elected to award Runge the jury's determination of $80,000.00 for compensatory damages from infringement. 17 U.S.C. § 101. Such an election is properly within the court's discretion. See Universal Pictures, supra. Thus, appellant's attack on the adequacy of the record to support the damages awarded is without merit."

Conclusion.

It is submitted that this case does not display any sufficient reason for the grant of a Writ of Certiorari. There is no conflict between the decisions of the Circuit Courts of Appeal with respect to the standard of originality required to secure copyright under the Federal Copyright Act and the Constitution of the United States. As to the questions presented in the Petition concerning indivisibility of copyright, the decision of the Ninth Circuit in the case at Bar is entirely consistent with the Second Circuit in *Goodis v. United Artists Television, Inc.*, 425 F. 2d 397 (C.A. 2d 1970). None of the other questions raised in the Petition concerning formalities of copyright notice and sufficiency of the evidence to sustain the Judgment and the implied findings of the jury as to copyright infringement and damages therefrom are of sufficient importance to be brought before this Court. It is submitted that the public interest has been served through the upholding by the Court of Appeals of the Judgment of the District Court, and that the Petition should be denied.

Respectfully submitted,

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By IRWIN O. SPIEGEL,
Attorneys for Respondent.

APPENDIX 1.

Opinion of the Court of Appeals for the Ninth Circuit.

Court of Appeals, Ninth Circuit.

Runge v. Lee et al. No. 24664.

Decided Mar. 26, 1971.

Appeal from District Court for Central District of California, Byrne, J.

Action by Senta Maria Runge against Joyce Lee and Joyce Eve Lee Cosmetics, Inc., for copyright infringement and unfair competition. From judgment for plaintiff, defendants appeal. Affirmed.

Robert D. Hornbaker and Mahoney, Hornbaker & Schick, both of Santa Monica, Calif., for appellants.

Irwin O. Spiegel, Los Angeles, Calif., for appellee.

Before Merrill, Carter, and Kilkenny, Circuit Judges.

Carter, Circuit Judge.

Runge filed suit against appellants Joyce Lee (hereafter Lee) and Joyce Eve Lee Cosmetics, Inc., (hereafter Lee Cosmetics) on related claims of copyright infringement and unfair competition pursuant to 28 U.S.C. §§ 1338 (a) and (b). Runge waived a jury trial, but the appellants demanded one. The jury awarded Runge: (a) $80,000.00 as compensatory damages for copyright infringement against Lee and Lee Cosmetics; (b) $40,000.00 as compensatory damages for unfair competition against Lee and Lee Cosmetics; (c) $25,000.00 as punitive damages for unfair competition against Lee; and (d) $20,000.00 as punitive damages for unfair competition against Lee Cosmetics. Thereafter, the district court judge determined, pursuant to stipulation,

that the net profits from infringement were $64,253.00. The court elected, however, to award Runge the $80,000.00 as compensatory damages for infringement, instead of the amount of profits. The district court also granted Runge $12,000.00 for attorneys' fees, issued a permanent injunction against further copyright infringement or acts of unfair competition, and ordered the remaining copies of Lee's infringing book impounded and destroyed. Judgment was entered accordingly. Lee and Lee Cosmetics appeal. We affirm.

Background.

Runge opened a salon in Los Angeles in 1957, where she instructed clients in facial exercise. In 1959, Runge wrote an article for Vogue Magazine describing her exercises, which became part of a book [Face Lifting by Exercise] that she published and copyrighted in 1961. Lee was a former interior decorator whose hobby was apparently the study and practice of facial exercise. In 1962, Lee was employed by Runge and was coached by her in facial exercise techniques. Lee gave exercise instructions at Runge's salon for about nine months, during which time she admittedly read and studied Runge's book thoroughly. In 1963, Lee left Runge's employ and opened her own salon in Los Angeles. In 1965, Lee published the allegedly infringing book—The Joyce Lee Method of Scientific Facial Exercises.

Runge's book contained verbal descriptions of various facial exercises, accompanied by illustrative photographs. The book sold approximately 1000 copies at $5.95, the last of which was sold in 1962. Lee's book also described various facial exercises, including virtually all those presented in Runge's book. Lee's

book was quite elaborate and sold about 8000 copies at $25.00. During 1965, Runge was preparing for publication a sequel to her original book, Runge learned of Lee's literary endeavors only after her "sequel" manuscript was rejected by various publishers because Lee's book would be on the market first.

The Issues.

Appellants raise a multitude of issues, some of which we discuss later herein. We note at the outset that, by electing a jury trial, appellants have made it impossible to have the careful findings of fact and conclusions of law that would have been available to us had the trial been to the court. Instead, we have in the record the general verdicts of the jury and the instructions of law given by the court to the jury. These verdicts and instructions have become, in substance, the equivalent of findings of fact and conclusions of law. If there was sufficient evidence before the jury on a particular issue, and if the instructions of law on that issue were correct, then the jury's verdict must stand.

The major issues in the case are:

(1) Was the copyright valid; did appellants infringe; was there sufficient evidence of damage?

(2) Did appellants engage in unfair competition; was there sufficient evidence of damage?

(3) Was there error in the instructions to the jury?

Numerous secondary issues are presented and some of them will be discussed in the treatment of the issues listed above.

A. Copyright Validity Issues.

Appellants assert on appeal that Runge's copyright is invalid because: (1) the book lacked the element of "novelty"; and, (2) Runge failed to disclose in her

copyright application the fact that portions of the book had been previously copyrighted by Vogue Magazine. Appellants failed to attack the copyright's validity at trial, but we will nevertheless consider the contention.

The standard of "novelty" urged by appellants is applicable to patents, but not copyrights. The copyright standard is one of "originality":

> "The requirements for the 'originality' necessary to support a copyright are modest. The author must have created the work by his own skill, labor and judgment, contributing something 'recognizably his own' to prior treatments of the same subject. However, neither great novelty nor superior artistic quality is required."

Doran v. Sunset House Dist. Corp., (S.D. Cal. 1961) 197 F. Supp. 940, 944, 131 USPQ 94, 97, aff'd (9 Cir. 1962), 304 F.2d 251, 134 USPQ 4. There was sufficient evidence before the jury to support a finding that Runge's book satisfied the originality requirement.

Runge's agreement with Vogue provided that the magazine acquired only publication rights to the materials and that the copyright was to revert to Runge for all further uses as of January 1, 1960. Thus, Runge was the beneficial owner of the copyright and entitled to unrestricted use of the materials after January 1, 1960. See, Witmer v. Harold Lloyd Corp. (S.D. Cal. 1930) 46 F.2d 792, 795; Goodis v. United Artists Television Inc., (2 Cir. 1970) 165 USPQ 3, reversing 278 F. Supp. 122, 157 USPQ 334 (S.D.N.Y. 1968).

Also, Runge's book contained substantial new matter not contained in her 1959 article. Therefore, the notice of copyright in the 1961 book represented complete compliance with the Act's requirements [17 U.S.C.

§ 7]. See e.g., Wrench v. Universal Pictures Co. Inc., (S.D. N.Y. 1952) 104 F.Supp. 374, 92 USPQ 350. There was certainly no evidence that Runge's application was intended to or did in fact deceive or mislead anyone. Accordingly, we must conclude that Runge's omission, if any, was innocuous and did not render the copyright invalid. Wrench, supra.

B. Copyright Infringement Issues.

Assuming that Runge's copyright is valid, appellants contend that Lee's book was a de minimus infringement or merely "fair use" of Runge's materials. The record indicates that Lee's book contained all 16 of the exercises described in Runge's book, but presented only one completely different facial exercise.

Chautauqua School of Nursing v. National School of Nursing (2 Cir. 1916) 238 F. 151, relied on by appellants, contains the general principles of copyright law. (1) "There cannot be exclusive property in a general subject"; (2) "The rights of any person are restricted to his own individual production"; (3) One has "a right to consult all previous publications on the subject"; and (4) "the question is whether the writer has availed himself of the earlier writer's work without doing any independent work himself"; or put differently, is the "production the result of independent labor or copying". (238 F. at 153).

As stated in Universal Pictures Co., Inc., v. Harold Lloyd Corporation, (9 Cir. 1947) 162 F.2d 354, 73 USPQ 317.

> "Complete or substantial identity between the original and the copy is not required. Copying and infringement may exist, although the work of the pirate is so cleverly done that no identity of language can be found in the two works."

Lee had access to Runge's book when she wrote her book. She was entirely familiar with the exercises as practiced by Runge. Lee's only published writing was an article in a newspaper on interior decorating. But Lee was able to write her book in one month during parts of November and December 1964. The complete manuscript was ready for printing in July 1965.

We have examined the court's instructions on the matter of copyrights and infringement, and cannot find them erroneous. The court gave instructions favorable to appellants' theories, based in the main on appellants' requested instructions. These instructions read: "The law allows anyone the right to publish and copyright a new treatment of a subject; and a similarity of form or impression between the two different writers which necessarily follows due to the nature of the subject matter or idea being conveyed is allowable and permissible. A new treatment of a subject matter that demonstrates *its independent production, or using a prior work, as a model, is allowable and not an unlawful copy.* If you find that a subsequent writer *used her own labors, skills or common sources of knowledge open to all men,* and that the resemblances are accidental, or arise from the nature of the subject matter, this does not amount to a wrongful copying * * *". [Emphasis added]

One of the issues before the jury was whether Lee by her own labors had made an independent treatment of the subject matter, or whether she had copied from Runge's book and relied on Runge's labors. The jury found on this against the appellants. We sustain its verdict.

Appellants also attack the adequacy of the evidence supporting the jury's determination of damages from in-

fringement. The record discloses evidence that appellants' infringement severely damaged the value of the reissue and republication rights of Runge's original book and her sequel. It is expressly provided in 17 U.S.C. § 1, that a person upon complying with the provisions contained in Title 17, shall have the exclusive right "(a) * * * to reprint * * * the copyrighted work", and "(b) * * * make any other version thereof * * *".

Runge testified that the value of her labor in writing the sequel was $20,000.00 (computed at $15 an hour), and that the value of publication rights for reissuance or continuation of her exercises was at least $100,000.00 (based on past experience). Credible testimony by the owner of literary property regarding its value can provide an adequate evidentiary basis for an award of damages. Universal Pictures Co., Inc. v. Harold Lloyd Corp., (9 Cir. 1947) 162 F.2d 354, 73 USPQ 317. The trial judge determined, pursuant to appellants' stipulation, that infringing profits amounted to $64,253.00 but elected to award Runge the jury's determination of $80,000.00 for compensatory damages from infringement. 17 U.S.C. §101. Such an election is properly within the court's discretion. See Universal Pictures, supra. Thus, appellant's attack on the adequacy of the record to support the damages awarded is without merit.

C. Unfair Competition Issues.

The unfair competition claims were based upon: (1) Lee having held herself out as the creator or originator of the facial exercises in question; and (2) Lee's use of deceptive "before" and "after" photographs on the cover of her book and in her promotional materials. It is

important to note that since there were no findings in this jury tried case, and since the jury did not return special verdicts, we must sustain the jury's determination if *either* of the claims is legally sound and supported by adequate proof.

Appellants first attack the jury's implicit finding that Runge was the originator of the facial exercises. Lee contends that there is no evidence that Runge did in fact originate the exercises and that, even if there were, such an interest is not legally protected. The court gave what we believe is a proper statement of the law, to-wit:

> "Where there is a secondary meaning or public identification between an author and a certain work or program and another person falsely represents that she is the originator of such work or program resulting in confusion of authorship, such representations constitute unfair competition."

See, e.g. Ojala v. Bohlin, (1960) 178 Cal.App.2d 22.

There was ample evidence from which the jury could have concluded that Runge was the creator or originator of the facial exercises. The record reflects that Lee refers to herself as the creator or originator of these exercises on numerous occasions in her book and promotional materials. Thus, there is sufficient evidence to support the jury's finding of unfair competition on this ground.

On the back cover of Lee's first edition and again on pages X and XI, there were two photographs of Margaret Kaumlen together with the following statements: "These photographs of Margaret Kaumlen at the

age of 55 years [were] taken at an interval of five months. This transformation was the result of using the Joyce Lee method of scientific facial exercise". In Lee's second edition of her book, the statement was modified as follows: "Here on the right is the same Margaret Kaumlen at the age of 52, the startling transformation was the result after five months of faithfully following the Joyce Lee method". These "before" and "after" photos were also used extensively in Lee's promotional materials and activities. Runge claimed these statements were false and misleading, and damaged her business reputation because she could not truthfully represent to prospective clients that her techniques would achieve similar results.

At trial, there was evidence that: (1) the "before" picture was a passport photo taken many years prior to the "after" picture; (2) the "after" photo was taken after Kaumlen had been performing the Lee exercises for only five months; but, (3) the "remarkable results" displayed in the "after" photo might also be attributable to facts shown by testimony in the record of the retouching of the photo negative, the wig worn by Kaumlen, and/or the slight cosmetic surgery that Kaumlen had undergone in the interim. On these facts, the jury could reasonably conclude that appellants' use of these photos constituted unfair competition.

Appellants also contend that the jury's award of $40,000.00 in compensatory damages for unfair competition was not supported by adequate evidence in the record. The record contains evidence that appellants' claims caused public confusion regarding the true originator of the exercises. Also appellants' "before" and "after" representations suggested results that Runge

was forced to tell prospective clients could not be obtained by her methods. It seems inevitable that Runge's business and reputation would suffer as a consequence of these representations. Runge testified that she had lost many salon customers to appellants and her sales of related cosmetics had declined as a result of appellants' representations. Accordingly, we conclude that appellants' contention that there is insufficient evidence to support the jury's verdict is without merit.

D. Other Contentions.

Appellants contest the jury's award of punitive damages for unfair competition. The court's instructions were both legally sound and very explicit in setting forth the factual elements that the jury would have to find in order to award punitive damages. The determination that appellants' acts were wanton and malicious was within the exclusive province of the jury. On this record, we cannot say that the jury's determination was erroneous.

Appellants attack the court's inclusion and exclusion of certain evidence. Having carefully reviewed these evidentiary rulings, we conclude that most of the rulings were entirely correct, and those that were arguably incorrect did not result in prejudice to appellants in view of the weight of other evidence in the record. We find no error.

Appellants assert that several of the court's instructions to the jury were incorrect statements of the law. We have reviewed these contested instructions and conclude that appellants' complaints are without merit.

Finally, the awarding of $12,000 attorney's fees was not improper. 17 U.S.C. § 116 provides that the court "may award to the prevailing party a reasonable attorney's fees as part of the costs." The patent cases cited by appellants are not applicable. The language of the old statute pertaining to patent cases, 35 U.S.C. § 70 (1946) and the new statute, 35 U.S.C. § 285 (1952) read differently from the copyright statute and do not control copyright cases.

The judgment of the district court is affirmed.

APPENDIX 2.

District Court's Findings of Fact and Conclusions of Law.

District Court, C. D. California.

Runge v. Lee et al. No. 66-831 WB.

Decided Apr. 21, 1969.

Action by Senta Maria Runge against Joyce Lee and Joyce Eve Lee Cosmetics, Inc., for copyright infringement and unfair competition. Judgment for plaintiff.

Irwin O. Spiegel, Los Angeles, Calif., for plaintiff.

Robert D. Hornbaker and Mahoney, Hornbaker & Schick, both of Los Angeles, Calif., for defendants.

Byrne, District Judge.

This cause for copyright infringement and unfair competition having been tried before a jury on February 3, 4, 5, 6, 7, 10, 11, 12, 13, 14 and 17, 1969 and the jury having found for the plaintiff, Senta Maria Runge, and against defendants Joyce Lee and Joyce Eve Lee Cosmetics, Inc. for copyright infringement and having awarded plaintiff damages therefor against said defendants in the amount of $80,000.00, and the jury having further found for plaintiff and against said defendants for unfair competition and having awarded plaintiff damages against said defendants in the amount of $40,000.00 therefor, and in addition the jury having found that plaintiff is entitled to an award of punitive damages by way of example for unfair competition and having assessed punitive

damages therefor against defendant Joyce Lee in the amount of $25,000.00 and against defendant, Joyce Eve Lee Cosmetics, Inc. in the separate and further amount of $20,000.00, and defendant Joyce Lee having withdrawn her counterclaim, and the matter having come on before the Court on March 24, 25, 26 and 27, 1969, for an accounting of profits for copyright infringement and injunctive relief and other remedies incidental thereto, plaintiff being represented by her attorney, Irwin O. Spiegel in such proceeding, and said defendants being represented by their attorney, Robert D. Hornbaker of Mahoney, Hornbaker and Schick, and the Court having heard evidence relating thereto and having considered the briefs and argument of counsel, and being fully advised in the premises, does now, therefore, make the following Findings of Fact and Conclusions of Law in respect to said matters, to wit:

FINDINGS OF FACT

I. The Court has jurisdiction of this matter under Title 28, Section 1338(a) and the Copyright Act of March 4, 1909, as amended, and enacted by Title 17 of the United States Code July 30, 1948, as amended, and Sections 101(a), (b), (c), (d) and 116 of Title 17 in respect to remedies for copyright infringement; and the Court has jurisdiction under Title 28, Section 1338(b) of the United States Code in respect to injunctive relief for unfair competition.

II. Based upon the stipulation of plaintiff and defendants, evidenced by defendants' Exhibit No. PD, the

Court finds that the net infringing profits made by defendant Joyce Eve Lee Cosmetics, Inc. in the sale of defendants' infringing book entitled "The Joyce Lee Method of Scientific Facial Exercises" are in the amount of $64,253, computed as follows:

GROSS SALES		$180,485.00
Cost of Sales and Production		35,657.00
Gross Profit		$144,828.00
Overhead Expenses:		
Salaries	$16,311.00	
Supplies	2,834.00	
Legal and Audit	2,500.00	
Insurance	1,812.00	
Interest	916.00	
Office and Postage	10,636.00	
Advertising & Promotion	16,821.00	
Rent	8,176.00	
Taxes and Licenses	5,363.00	
Telephone	1,945.00	
Utilities	412.00	
Travel and Auto	10,836.00	
Depreciation	2,013.00	
TOTAL COSTS		$ 80,575.00
INFRINGING NET PROFIT		$ 64,253.00

III. The Court finds that defendants have 11,158 copies of said infringing book, "The Joyce Lee Method of Scientific Facial Exercises," in defendants' possession or under their control.

IV. The Court finds that defendants threaten and intend to continue to print, reprint, copy and sell de-

fendants' said infringing book unless enjoined and restrained by order of this Court or the Court further finds that defendants threaten and intend to continue falsely and misleadingly to represent defendant Joyce Lee as the originator of exercises for the face, copied by defendants from plaintiff's book entitled "Face Lifting by Exercise", unless enjoined and restrained by order of this Court; and that defendants further threaten and intend to continue falsely and misleadingly to represent that the change in appearance of one Margaret Kaumlen, depicted in photographs and words relating thereto on the outside of the book cover of defendants' said infringing book and on frontis-pages x and xi therein, was the result of using the facial exercises contained in defendants' said book for the period of five months, unless enjoined and restrained by order of this Court.

V. The Court finds that plaintiff is entitled to a reasonable attorney fee as part of her costs in the prosecution of her claim for copyright infringement.

CONCLUSIONS OF LAW

I. Inasmuch as the damages awarded to plaintiff by the jury for infringement of copyright in the amount of $80,000 are larger than the net infringing profits of defendant Joyce Eve Lee Cosmetics, Inc. in the amount of $64,253, plaintiff is entitled to an award of the higher of the two—that is, damages in the amount of $80,000 for copyright infringement against defendants and each of them. Universal Pictures Co., Inc. v. Harold Lloyd Corp., 162 F.2d 354, 73 USPQ 317 (9th Cir., 1947).

II. Plaintiff is entitled to an injunction permanently enjoining and restraining defendants and each of them and said defendants' officers, employees, agents, suc-

cessors, affiliates, assigns, licensees, and each of them, from printing, reprinting, copying or vending defendants' said infringing book entitled "The Joyce Lee Method of Scientific Facial Exercises" or any version thereof that copies copyrightable subject matter from plaintiff's book entitled "Face Lifting by Exercise." Said injunction shall furthermore enjoin defendants and each of them, and said defendant's officers, employees, agents, successors, affiliates, assigns, licensees, and each of them, from representing publicly by written or oral utterances or statements that state in words or in substance that defendant Joyce Lee originated any of the exercises for the face contained in plaintiff's said book; "Face Lifting By Exercise." Said injunction shall furthermore permanently and absolutely enjoin and restrain defendants and each of them, and said defendants' offices, employees, agents, successors, affiliates, assigns, licensees, and each of them, from any further use of the comparative photographs of said Margaret Kaumlen appearing on the outside book cover and within defendants' said book, together with any statement or utterance in writing or orally, in words or substance that the change in appearance of said person depicted therein is the result of the use of any or all of the exercises for the face contained in defendant's said book, that were copied from plaintiff's said book. Title 17, Section 101(a), California Civil Code, Section 3369; O Jala v. Bohlin, 178 Cal.App.2d 292.

III. Defendants shall deliver said 11,191 infringing copies of defendants' said book, "The Joyce Lee Meth-

od of Scientific Facial Exercises", to the Clerk of this Court forthwith and all transcripts, photographs and other matter used in connection with the production thereof, together with an affidavit stating that delivery constitutes all such books and such other matter; and the Clerk shall impound and keep said books and said other matter until the Judgment herein has become final; and when the Judgment has become final, the Clerk shall destroy the same. Title 17, Section 101-(c)(d).

IV. Plaintiff shall be entitled to a reasonable attorney fee in the amount of $12,000 as part of her costs in this action for copyright infringement.

APPENDIX 3.

Appendix 3—Page 1 to Respondent's Brief.

Summary of the Exercises.

FACE-LIFTING By EXERCISE	THE JOYCE LEE METHOD OF SCIENTIFIC FACIAL EXERCISES
Exercise No. 2 "Firms and Fills Out Back of Cheeks" (Text on pp. 72 and 73)	*Exercise No. 4* "To Fill Out Hollow in Back of Cheek" (Text on pp. 45 and 46)
Exercise No. 3 "For Firming Lower Cheeks and Mouth Corners" (Text on pp. 74 and 75)	*Exercise No. 6* "To Remove Hollows and Lines in Lower Cheeks" (Text on pp. 58 thru 64)
Exercise No. 3 "For Firming Mouth Corners" (Text on pp. 78 and 79)	*Exercise No. 13* "To Lift Droopy Mouth Corners" (Text on pp. 110 thru 113)
Exercise No. 3-A "Filling Out Lower Cheeks" (Text on pp. 78 and 79)	*Exercise No. 3* "To Fill Out Hollow in Center of Cheek" (Text on pp. 40 thru 43)
Exercise No. 4 "For Jowls and Vertical Lines from Mouth-Corner Along the Chin to Jowls" (Text on pp. 80 thru 82)	*Exercise No. 7* "To Remove Pouch" (Text on pp. 65 thru 72)
Exercise No. 5 "For Wrinkles on Upper Lip and Filling Out the Lips" (Text on pp. 84 and 85)	*Exerice No. 14* "To Remove Lines on Upper Lip" (Text on pp. 114 thru 118)

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FACE-LIFTING BY EXERCISE	THE JOYCE LEE METHOD OF SCIENTIFIC FACIAL EXERCISES
Exercise No. 5-A "For Filling Out and Eliminating Wrinkles of Upper Lip" (Text on pp. 86 and 87)	*Exercise No. 14-A* "To improve Upper Lip" (Text on pp. 119 thru 121)
Exercise No. 6 "For Chin . . ." (Text on pp. 88 and 89)	*Exercise No. 2* "To Correct Chin Faults" (Text on pp. 32 and 33)
Exercise No. 6-A "For Strengthening Chin Muscles and to Fill Out Lower Lip" (Text on pp. 90 and 91)	*Exercise No. 2-B* "To Remove Hollows in Chin" (Text on pp. 38 and 39)
Exercise No. 7 "For Lifting Upper Cheeks and Removing Laugh Lines" (Text on pp. 92 thru 95)	*Exercise No. 5* "To Lift Droopy Cheeks" (Text on pp. 47 thru 57)
Exercise No. 8 "For Horizontal Lines on Forehead" (Text on pp. 96 and 97)	*Exercise No. 12-A* "Preliminary" (Exercise for Horizontal Lines on Forehead)
Exercise No. 9 "For Vertical Lines on Forehead and Between Eyebrows" (Text on pp. 98 and 99)	*Exercise No. 20* "To Remove Scowl Lines" (Text on pp. 155 thru 160)
Exercise No. 10 "For Slack Hanging Eyelids" (Text on pp. 100 thru 102)	*Exercise No. 18* "To Lift Droopy Eyelids and Eyebrows" (Text on pp. 145 thru 149)

Appendix 3—Page 3 to Respondent's Brief.

FACE-LIFTING BY EXERCISE	THE JOYCE LEE METHOD OF SCIENTIFIC FACIAL EXERCISES
Exercise No. 11 "For Wrinkles Around the Eyes—To Refresh Eye Area Due to Tiredness" (Text on p. 104)	*Exercise No. 16* "To Eliminate Wrinkles and Tighten Area Under Eyes" (Text on pp. 131 thru 135)
Exercise No. 11-A "For Wrinkles Around the Eyes—To fill Out Hollowness Underneath the Eyes" (Text on pp. 105 thru 107)	*Exercise No. 16-A* (For Lines and Wrinkles, Bags and Hollows Under the Eyes) (Text on pp. 136 thru 138)
Exercise No. 11-B "For Crow's Feet" (Text on pp. 108 thru 110)	*Exericise No. 17* "To Remove Crow's Feet" (Text on pp. 140 thru 143)